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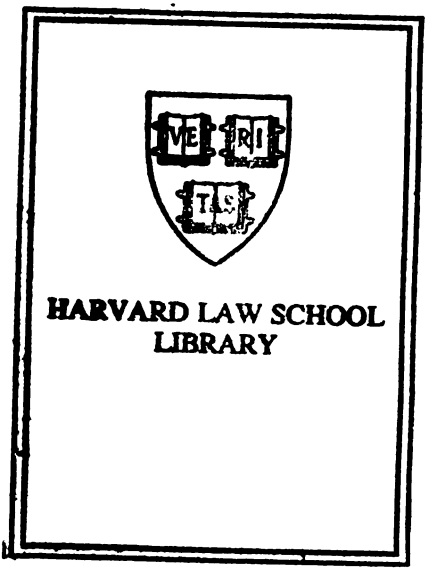

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11

MICHIGAN REPORTS.

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

OCTOBER 9, TO DECEMBER 21, 1891.

WILLIAM D. FULLER,

STATE REPORTER.

VOL. 88.

CHICAGO:
CALLAGHAN & CO.,
1892.

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STATE JUDICIAL DIRECTORY

For 1892.

SUPREME COURT.

ALLEN B. MORSE (CHIEF JUSTICE), ... IONIA.
[TERM EXPIRES DECEMBER 31, 1893.]

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CHARLES D. LONG, . . .	DETROIT, ...	Dec. 31, 1897.
CLAUDIUS B. GRANT, . .	MARQUETTE, . . .	Dec. 31, 1899.
ROBERT M. MONTGOMERY,	GRAND RAPIDS, . .	Dec. 31, 1901.

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8.	VERNON H. SMITH,	IONIA.
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10.	CHAUNCEY H. GAGE, JOHN A. EDGET,	SAGINAW.
11.	JOSEPH H. STEERE,	SAULT STE. MARIE.
12.	WILLIAM D. WILLIAMS,	MARQUETTE.
13.	J. G. RAMSDELL,	TRAVERSE CITY.
14.	ALBERT DICKERMAN,	MUSKEGON.
15.	NOAH P. LOVERIDGE,	COLDWATER.
16.	ARTHUR L. CANFIELD,	MT. CLEMENS.
17.	WILLIAM E. GROVE, ALLEN C. ADSIT,	GRAND RAPIDS.
18.	GEORGE P. COBB,	BAY CITY.
19.	J. BYRON JUDKINS,	REED CITY.
20.	DAN. J. ARNOLD,	ALLEGAN.
21.	HENRY HART,	MIDLAND CITY.
22.	EDWARD D. KINNE,	ANN ARBOR.
23.	WILLIAM H. SIMPSON,	AU SABLE.
24.	WATSON BEACH,	LEXINGTON.
25.	JOHN W. STONE,	MARQUETTE.
26.	ROBERT J. KELLEY,	ALPENA.
27.	JOHN H. PALMER,	BIG RAPIDS.
28.	FRED H. ALDRICH,	CADILLAC.
29.	SHERMAN B. DABOLL,	ST. JOHNS.
30.	ROLLIN H. PERSON,	HOWELL.
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33.	CHARLES J. PAILTHORP,	PETOSKEY.

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RECORDER'S COURT OF DETROIT,

GEORGE S. SWIFT, Recorder.

F. H. CHAMBERS, Associate Recorder.

Terms of Court.

Jan. 6, March 2, May 4, July 6, Sept. 7, Nov. 2, 1892.

SUPERIOR COURT OF GRAND RAPIDS, EDWIN A. BURLINGAME.

Terms of Court.

March 10 and May 12, 1892.

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TERMS OF COURT FOR 1892.

COUNTIES.	CIRCUITS.	SESSIONS OF COURT.			
Alcona	23	January 5.	June 7.	October 4.	
Alger	11	May 10.	Nov. 8.		
Allegan	20	February 8.	May 16.	October 3.	December 5.
Alpena	26	February 9.	May 3.	August 9.	November 1.
Antrim	13	February 2.	April 26.	July 19.	November 28.
Arenac	18	February 29.	Aug. 29.		
Baraga	12	January 5.	July 5.	October 4.	
Barry	5	February 8.	May 2.	August 15.	November 14.
Bay	18	March 1.	June 7.	September 6.	December 6.
Benzie	23	April 5.	Aug. 2.	December 13.	
Berrien	2	January 12.	March 15.	May 17.	October 18.
Branch	15	March 7.	June 13.	October 3.	December 5.
Calhoun	5	March 14.	June 6.	September 12.	December 5.
Cass	2	February 16.	April 26.	September 27.	December 6.
Charlevoix	13	January 26.	April 12.	July 12.	November 21.
Cheboygan	33	January 26.	April 26.	July 26.	September 27.
Chippewa	11	February 9.	May 17.	September 20.	November 22.
Clare	21	January 4.	March 28	June 27.	September 19.
Clinton	29	February 1.	April 25.	June 27.	November 14.
Crawford	23	January 12.	June 14.	October 11.	
Delta	25	January 19.	April 19.	July 26.	October 18.
Dickinson	25	January 5.	April 5.	July 19.	October 10.
Eaton	5	January 11.	April 11.	July 4.	October 10.
Emmet	33	January 5.	April 5.	July 12.	September 6.
Genesee	7	January 4.	April 5.	August 1.	October 10.
Gladwin	18	April 11.	Oct. 17.		
Gogebic	32	February 9.	May 10.	August 16.	November 15.
G'd Traverse	13	January 4.	April 5.	July 5.	November 14.
Gratiot	29	March 14.	June 6.	September 12.	December 5.
Hillsdale	1	January 12.	March 15.	September 6.	November 8.
Houghton	12	January 19.	April 26.	August 2.	November 1.
Huron	24	January 4.	March 14.	June 6.	October 24.
Ingham	30	January 11.	March 14.	May 16.	September 26.
Ionia	8	February 1.	May 2.	September 19.	November 7.
Iosco	23	February 2.	May 3.	August 2.	November 1.
Iron	25	February 15.	June 6.	October 3.	
Isabella	21	February 22.	May 16.	September 5.	October 24.

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TERMS OF COURT FOR 1892.

COUNTIES.	CIRCUITS.	SESSIONS OF COURT.			
Jackson	4	Jan. 4, March 7.	May 2.	September 12.	November 14.
Kalamazoo	9	February 15	May 16.	October 10.	December 12.
Kalkaska	28	January 19.	April 19.	July 26.	November 1.
Kent	17	March 7.	May 2.	September 26	December 5.
Keweenaw	12	January 12.	July 12.	October 11.	----------
Lake	19	February 15.	June 20.	October 10.	----------
Lapeer	6	January 11.	March 14.	July 11.	November 7.
Leelanaw	13	February 9.	May 17	October 4.	----------
Lenawee	1	February 9.	April 26.	October 4.	December 13.
Livingston	30	February 8.	April 18.	June 20.	November 14.
Luce	11	May 3.	Nov. 1.	----------	----------
Mackinac	33	February 23.	June 28.	August 16.	October 25.
Macomb	16	January 11.	April 11.	June 20.	October 10.
Manistee	19	February 1.	May 2.	August 8.	November 14.
Manitou	33	May 17.	Oct. 18.	----------	----------
Marquette	25	February 23.	May 16.	September 13.	December 6.
Mason	19	January 4.	April 4.	July 4.	October 3.
Mecosta	27	January 5.	April 5.	July 5.	November 1.
Menominee	25	February 1.	May 2.	August 22.	November 14.
Midland	21	January 18.	April 11.	August 29.	October 3.
Missaukee	28	March 1.	May 24	September 6.	December 6.
Monroe	22	February 2.	April 5.	September 13.	November 1.
Montcalm	8	March 7.	June 6.	October 3.	December 5.
Montmorency	26	May 17.	Oct. 18.	----------	----------
Muskegon	14	February 8.	May 9.	September 12.	November 28.
Newaygo	27	March 1.	June 7.	October 4.	December 6.
Oakland	6	February 1.	May 2.	September 19.	December 5.
Oceana	14	January 11.	April 18.	August 15.	October 24.
Ogemaw	23	January 19.	June 21.	October 18.	----------
Ontonagon	32	February 2.	June 21.	October 18.	----------
Osceola	19	March 7.	June 6.	September 19.	December 12.
Oscoda	23	January 26.	June 28.	October 25.	----------
Otsego	26	January 19.	June 21.	October 4.	----------
Ottawa	20	January 11.	March 14	August 1.	November 7.
Presque Isle	26	January 12.	June 14.	October 11.	----------
Roscommon	28	January 12.	May 10.	September 13.	----------
Saginaw	10	January 11.	March 14.	May 9, Sept. 12.	November 14.
Sanilac	24	January 18.	April 18.	June 27.	September 26.
Schoolcraft	11	January 12.	April 19.	September 6.	----------
Shiawassee	7	February 8.	May 9.	September 5.	November 21.
St. Clair	31	February 1.	Apr. 4, Jun 6	October 3.	December 5.
St. Joseph	15	January 19.	March 22.	July 12.	October 25.
Tuscola	24	February 9.	May 10.	September 6.	December 6.
Van Buren	9	January 11.	April 11.	September 12.	November 14.
Washtenaw	22	March 7.	May 2.	October 3.	December 5.
Wayne	3	January 5.	April 5.	June 21.	September 13.
Wexford	28	March 8.	June 7.	September 20.	December 20.

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ISAAC MARSTON.

Upon Tuesday afternoon, February 2, 1892, being the time assigned for the presentation of resolutions in connection with the death of the Hon. ISAAC MARSTON, formerly one of the Justices of this Court, which occurred on October 31, 1891, Hon. A. A. Ellis, Attorney General, addressed the Court as follows:

May it please the Court:

For the third time within two years this Court has been called upon to pause in its labors to hear the announcement of a death of one of its former members, and to pay the tribute of respect to the memory of a revered associate. In the case of two of those to whom I refer, rest came after a long, active life, and at the close of careers of honor and distinction, protracted beyond the ordinary span of human life. Of Judge CAMPBELL and Judge CHRISTIANCY it could be appropriately said that they died at a ripe old age, after an honorable career, and were entitled to rest from their labors. Now we are called upon to mourn the loss of one who has been cut off in his prime, at an age when he was still gathering of the knowledge of this world, and enjoying the blessings of home and family, and when hope and ambition still stirred in his breast, and while yet friends and associates leaned upon him, as a true friend and a strong man, whose courage, judgment, and honest purposes made him dear to all who knew him.

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ISAAC MARSTON, who a short time ago occupied the position of Chief Justice of this Court, and who had held many places of honor and trust in the gift of the people of this State, is dead, and in his death the State lost one of its most honored citizens. Cut off, as he was, at the age of fifty-two years, his death was a public calamity.

He was precocious in his youth, but unlike many, if not most, of those who matured young, he had not ceased to grow in wisdom, in knowledge, and in those graces of character which made him each year more dear to his multitude of friends. The bench, the bar, and the people of this State loved and trusted him, and had great expectations for his usefulness, which death abruptly terminated.

For some time past his friends, and those who were intimately connected with him, knew that his life was fast waning away, and that the time was short when we would be called upon to mourn his death. Only two terms ago ISAAC MARSTON argued his last case before this Court. I remember how weak in body he was at that time, but how strong and clear were all his mental faculties. Before this same table where I now stand speaking of his departure, he sat in the chair, in body too weak to stand before the Court, his mind free from any cloud, and his keen perceptions of the law seeming to grow clearer as his hold on life grew weaker and weaker.

Judge MARSTON was a self-made man, true to his convictions and true to his friends. He was born on a foreign shore, adopted this State as his home, and, step by step, a day laborer, an office boy, a lawyer, a representative, the attorney for the State, and a Judge of this high Court; and all those changes were brought about within a space of about nineteen years. Well might

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the people of this State mourn the loss of so good and wise a citizen.

I have been commissioned by the Detroit Bar to present to this Court a copy of the resolutions adopted at a meeting called to express their sense of loss at the untimely death of their friend, and ask that they be spread on the journals of the Court, and published in the records, as a perpetual memorial of the high esteem in which he was held by them.

In the same manner also I have been requested by the Bar of Bay county, where Judge MARSTON'S early practice was mostly had, and his early triumphs secured, to present the resolutions adopted by them, and ask that the same disposition be made of them.

Resolutions of the Detroit Bar Association.

Judge ISAAC MARSTON was born January 3, 1839, in the county Armagh, Ireland, beginning life as apprentice to a merchant. He served three years in that capacity, when his enterprising spirit could no longer brook the shackles of small employment, and he came to this country at about the age of seventeen years, hopeful of the possibilities for greater improvement which our institutions afford. Without means, and without assured employment, he began his life in this country in Oakland county, Michigan, as a farm laborer. With but thirty dollars, an accumulation that even in those days seemed small and meagre, he entered the law department of the University of Michigan. After a stay there of but two years, he graduated among the first of his class, and opened a law office at Alma, in Gratiot county. It seemed as if Providence intended that privation and misfortune should strengthen his character and bring out the reserve of latent energy which he showed up to his last sickness, for, before he had established a clientage,

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or was even sustaining himself, his office and books were destroyed by fire. This was the turning point of his career, and two years later he removed to Bay City, and there engaged in the practice of his profession, subsequently becoming a partner of the Hon. H. H. Hatch, and afterwards with E. A. Cooley, Esq., under the firm name of Marston, Hatch & Cooley.

During this period Mr. MARSTON had served as justice of the peace, prosecuting attorney, and city attorney. He was elected a member of the State Legislature in 1873, and in 1874 he was appointed Attorney General by Governor Bagley. In 1875 he was elected by a most complimentary vote to the Supreme Bench of this State to fill the vacancy caused by Judge CHRISTIANCY'S election to the United States Senate. He resigned in 1883, and the rest of his life has been spent in the practice of law among us here in Detroit.

Judge MARSTON'S career is remarkable, even in this country of great possibilities. Starting a poor boy, before the age of fifty he had achieved high honors in the legislative department of the State, and had served with rare ability as Attorney General, and had filled, to a higher measure than the average, the exalted offices of Associate Justice and Chief Justice of this State.

As a lawyer he was the peer of any. Fearless and honorable to a high degree, he added to his ability the weight of these attributes, and was an antagonist in the trial courts whom no good lawyer met with undue confidence. His services upon the Bench are shown in his clear, lucid, and forcible opinions. As a man he was honest in every act of life. He hated all shams, and did not hesitate to unmask them. His disposition was generous, his love of humor great; and his kindness of

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heart and ready sympathy made him a colleague and associate whom to know was at the same time to love. Although he had been less than ten years in practice at this bar, we feel we are in bounds in saying that the death of scarcely any other of its members would come to so many of us with so great a realization of personal loss.

Resolved, That we express our most heartfelt sympathy with his bereaved family, in whose sorrow we share, and that a suitably engrossed copy of these resolutions be transmitted to them.

Resolved, That these resolutions be presented to the Supreme Court of this State, to the United States Circuit Court for the Eastern District of Michigan, and to the Circuit Court for the County of Wayne, with a request that they be spread upon the journals of these courts.

Detroit, November 2, 1891.

(Signed) HENRY M. DUFFIELD.
JOHN D. CONELY.
MICHAEL BRENNAN.
WM. H. WELLS.
JOHN G. HAWLEY.

EDWARD W. PENDLETON,
Secretary Detroit Bar Association.
[SEAL]

Resolutions of the Bay County Bar.

At a meeting of the Bay County Bar Association, held at the circuit court rooms in Bay City on the second day of November, A. D. 1891.

Present, H. H. HATCH, President, F. S. PRATT, Secretary, and the members of the association.

The chair announced the fact of the death of Hon. ISAAC MARSTON, formerly a member of this association. Addresses were made by several of the members, and thereupon a committee was appointed to draft appropriate

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resolutions. Hon. T. A. E. Weadock, chairman of said committee, reported the following resolutions, which were read and unanimously adopted:

Resolved, By the members of the Bay County Bar, at a meeting convened on occasion of the death of Hon. ISAAC MARSTON, late Chief Justice of the Supreme Court of Michigan, that we learn with profound sorrow of the decease of so eminent and esteemed a member of our profession; that in his death our profession has lost one of its ablest and brightest minds, a jurist of extraordinary ability; that his decisions on the Bench were progressive, and did much to mould the law of our State because of their practicability and adaptation to our age; that as a member of the State Legislature, Attorney General of the State, and a Justice of the Supreme Court, and in other responsible positions, he always brought to bear not only rare ability, indomitable energy of purpose, and a clear perception of the requirements and responsibilities of the position, but that honesty and integrity of purpose that marked him a man, a jurist, and a statesman.

Resolved, That we commend to our brethren of the bar his example as a faithful and affectionate husband and father; a loyal, generous, and devoted friend; a public-spirited and honorable citizen; a jurist, judge, and an able, zealous, and courteous lawyer.

Resolved, That a copy of these resolutions be presented to the Supreme Court of the State of Michigan, the United States Circuit Court for the Eastern District of Michigan, the Circuit Court for the County of Bay, and to the widow of Judge MARSTON, and that each of said courts be requested to enter the same at length upon its records.

Hon. THOMAS M. COOLEY spoke as follows:

May it please your Honors:

It is not as a mere formality that I appear here to-day

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to second the resolutions that have been presented to you by the learned Attorney General.

It was my great good fortune to be the acquaintance and friend of Judge ISAAC MARSTON for thirty years. I saw him, perhaps, first of all those who are here to-day, when he came to me, still a boy, not yet having reached the age of twenty-one, to express his desire to enter upon the study of the law. A little inquiry showed to me that he was without the usual attainments that are deemed necessary before that study is entered upon. His education was slight. He had been a grocer's apprentice in a distant land. He had come from that land without the means of support, and, landing in this country, he was glad to accept the position of "hired man," as we express it, upon a farm. He had worked there for a time, but only while he was determining in his own mind what he would take up as his business for life; and when he had decided to study law he came to the University. But he came without the means of living there. And, what would have appeared singular in most men, he seemed to be without a perception of the fact that want of pecuniary means constituted serious impediment to a man who was about to start out in life. To him it only presented a state of facts that might render necessary unusual and more persistent efforts than must be made by others who, by birth or otherwise, were differently circumstanced. But he took it as a matter of course that he was to make all necessary effort, and that in some way he would find work, however undesirable in itself, whereby he might pay his way through the University. It never occurred to him that with sufficient willingness he could fail in this; and with the aid of those he met there, who saw in his face the proofs of energy and worth, he happily did not fail. In the mean time he was perfectly willing to submit to such deprivations as would naturally

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come in his way, and to live in the simplest and least expensive manner. In short, he saw something ahead he was to attain, and he proceeded at once to put aside such obstacles as stood in his way, without apparently a thought or a suspicion that there was a possibility he might not succeed. Nor did those who learned to know him at the University fear that failure would be his lot. They noticed his earnestness, they learned how quick were his perceptions, how soon he mastered legal principles, and how readily he made friends, and they prophesied for him an honorable, if not a high, career. Meantime, however, he was willing to do whatever was honorable to enable him to support himself and the young family he soon had on his hands, provided it did not take him away from his selected business. He filled for a time the lowest judicial office in the State, not thinking it beneath him, so long as it gave him a support and enabled him to be useful to his fellow citizens. Gradually we see him rise above that. It was not long before we find him a member of the Legislature of the State, and hear of him there as a man of influence. The grocer's apprentice had become an important man in the State.

Now, to those who knew how recent it was that he was an apprentice boy, this speedy elevation may seem strange, unless they knew, as we did, how willing he was to work, how quick he was in perception, how readily he seemed to grasp a legal proposition and follow it to its logical conclusions. It was no more than was to be expected that a young man of that character, even though his abilities be not of the highest, should achieve a high position.

It was not many years when, a vacancy having occurred in the office of Attorney General of the State, that great-hearted and careful executive and that good judge of men,

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John J. Bagley, invited him to fill the place. I need not stop here to show in detail that he filled it well, for that is what we all know. And then, a few years later, when a vacancy was made on the Bench of this Court by Judge CHRISTIANCY retiring from it, he was called to fill that place. He seemed to come to it by a species of natural selection. It was thought due to that part of the State, and he was the man to whom, for his fitness, men naturally turned, so he was invited to it.

I might stop here to enumerate one by one the qualities which I think eminently fitted him for the place. His character was entirely above reproach; his integrity was unquestionable; his mind was judicial in the highest degree; he was as free as any man with whom it has been my fortune to be acquainted from anything in the nature of prejudice, or of such partisanship as could in the least degree raise any question as to the possibility of partiality or dislike swaying his judgment; and nobody raised any question of his eminent fitness for the place in this regard, or ever suspected that he could be swerved one way or the other by political, social, or personal affiliations.

In his judicial decisions he always addressed himself to the very point in issue, caring very little for the graces of language, and not apparently seeming to think them important. He was on the Bench to do what was right, to apply the law directly to such cases as came before him, and he used such language as would, in his opinion, be understood, and, instead of leading any one into confusion, would furnish a useful precedent in future cases; and that was all he seemed to care for. His career upon the Bench was not so long as the people would have liked to have it. I cannot say with entire certainty why he retired. I think there were several reasons. His failing health was probably more manifest to him than it

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was to us; and, if he saw the end of his career not far off, he was not to be blamed if he desired to increase his income so as to leave his family in a position that secured them in comfort, and in at least the ordinary enjoyments of life. He did not go, however, until he had made such mark in the judicial records of the State as will remain always to his credit. He filled the place that had been filled by ISAAC P. CHRISTIANCY; he sat upon the Bench between JAMES V. CAMPBELL and BENJAMIN F. GRAVES: and when I say that he was recognized by the bar and the people as filling fitly the place of the first, and as being fit associate of the other two in judicial work, I have said all that need be said in his honor, for these were men who in any country having a jurisprudence similar to ours might do honor to any court.

And yet I would say something further in his honor. No doubt ISAAC MARSTON was ambitious; it was right he should be so; it is right that all men shall be so. The Attorney General has well spoken of him as a remarkable man, and we assent to this at once when we remember in how short a time he stepped from the position of a mere day-laborer to the highest place in the judiciary of a great state; and no doubt every step he took in that elevation was a step that gratified him. But there was something that he loved more than all these, and that, when he had reached this high position, he enjoyed beyond all the gratification that could have been brought him by official position of any grade. ISAAC MARSTON was pre-eminently a man who loved his home, his wife, and his children. His wife had followed him on the way up from the first step to the last, and was gratified, no doubt, as he was, with every advancement; but with each of the two the highest enjoyments were to be found where he in retiring sought them,—in the home circle.

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It is sometimes expected on occasions like this that something will be said about a man's religious life. I shall say little in that regard in respect to Judge MARSTON, for he himself was accustomed to say but little. I can say that he was frank, he was just, he was true; that in all the nearest and dearest relations of life he was not merely a man above reproach, but he was an exemplar in any community of which he was a member; but I cannot say he ever belonged to any professed religious society. I know this, however, that any society, professedly religious or otherwise, that adopts and seeks to follow the teachings of the Man of Nazareth and the doctrine of the universal brotherhood of man, and demands no assent to creeds which assume a knowledge of the unknowable—any such society would have thrown wide open its doors of membership to ISAAC MARSTON, and welcomed him as a worthy brother.

Mr. JUSTICE MCGRATH spoke as follows:

"Before man made us citizens, great Nature made us men."

It was my fortune to meet Judge MARSTON in active practice at the bar, and to me the charm of his life was his personal character. His ready wit, his genial disposition, his professional courtesy, never forsook him. In the heat of trial or of discussion, notwithstanding his earnestness, his intense devotion to the interests of his client, he never forgot his manliness. Honored in his profession, his ability as a lawyer of high standing recognized, he never forgot the amenities of that profession. He never allowed the spleen of his client to affect his conduct of the cause in hand.

He was a foeman worthy of our steel, yet he fought without acrimony. He gave to his client the highest fidelity, the best of his intellect; but no retainer was large enough to cause him to forget the respect due the

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court, the decorum of the court-room, or the dignity of his calling. Searching in his examination of witnesses, he never forgot that a witness had rights which a lawyer was bound to respect. Often witty, then sarcastic, then invoking invective; but his wit and sarcasm and invective were without poison, and left no heart-aches. He was a brave antagonist, yet never querulous. Good nature, always the sign of a large and generous soul, pervaded his every act.

Whether upon the Bench, in the midst of a hotly contested trial, in his office, at a gathering of his professional friends, or in that home that he loved so fondly, there was the same geniality of disposition always. Into every circle he carried a glow and warmth of friendliness that dispelled all stiffness, invited good cheer, and created an atmosphere of good-fellowship. He always charmed us with his native wit, and captured us with his sincerity and candor. There was no malice in his nature, no dyspepsia in his disposition.

Even after he realized that death had thrown its shadow across his pathway, he knew no fear, but maintained his wonted cheerfulness, and met the grim destroyer like a man conscious of an upright life. He approached his grave like one "that wraps the drapery of his couch about him, and lies down to pleasant dreams."

There was no pedantry in ISAAC MARSTON'S make-up. His great and generous nature lifted him above arrogance. He laid aside the ermine and took up the green bag in my own city with that native modesty that characterized his life. His presence was soon felt in that metropolis, and he has left his footprints and finger-marks there as everywhere. He soon gathered about him a large circle of warm and enthusiastic friends.

ISAAC MARSTON honored the bench, honored the bar. The biography of his life abounds with practical lessons.

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Its first chapters are replete with instances of hardship, of reverses, of struggle, of perseverance, of application and unflagging industry. Its later chapters abound with rich results, born of those earlier struggles, of that application and untiring industry, which alone can give to genius the strength to conceive.

"To those who know thee not, no words can paint;
And those who know thee know all words are faint."

Remarks by Mr. JUSTICE LONG:

The story of the life and character of Judge MARSTON never loses its interest by repetition. It illustrates the possibilities of success in this country,—of a young man of foreign birth coming here without friends or money, a stranger in a strange land, and building for himself a name and fortune. He came, a mere boy, and by his industry, integrity, and ability elevated himself to one of the most honorable positions in the State; and he has left his imprint upon the public affairs of the State, which are enduring monuments of his greatness.

But few of us here to-day knew him personally in his young manhood. That he was filled with an ardent and mastering ambition to overcome all obstacles to success, no one can doubt who became acquainted with him after his advent from the law school at Ann Arbor. From what has been said of him in those years before taking his law course, it is apparent that he was no ordinary boy. He was poor, and, though not struggling with abject poverty, he was compelled to earn a livelihood, and, like many young men of those days, he did whatever his hands found to do. He worked upon a farm and at other kinds of manual labor until he acquired sufficient to start himself at Ann Arbor. What his ambitions and aspirations were then we may pass over. It is his life after he entered upon his profession as a lawyer of which I shall speak.

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He settled in Gratiot county, and for a time struggled for a livelihood and a name and fame as a lawyer. Perhaps he passed through that state of waiting and hoping for clients that has been the common lot of the most of us who started in the profession of the law as our life work. We who are gathered here may look back upon those struggles as something akin to our own struggles, our own hopes and aspirations, successes and failures.

He tarried for a time in Gratiot county, and then moved to Bay county, where his real work as a lawyer began. My first recollection of him is his appearance as one of the counsel in a suit in the circuit court for Genesee county which had been transferred from Bay. He was a young man, and in appearance a mere boy; but well do I remember the impression his management and conduct of that trial left upon me. He was calm and deliberate in his presentation of the case and in the putting in of the testimony; but, when he came to the argument, he presented it in all its features with such logic and force that it was remarked by the members of the Genesee county bar that young MARSTON would make his mark in the world.

Soon after this, in one of the political struggles of the sixth congressional district, in which young MARSTON refused to be bound by the action of his party convention, because he did not believe in the candidate of its choice, he was styled by the supporters of the candidate the "Boy from Bay." He was thus early in his political and party affiliations so resolute and fearless that no party ties could bind him unless he was convinced of the purity of the candidate and his fitness for the place, as also that justice and fair dealing had been used in securing such nomination. This manliness and fearlessness in his actions, which no party ties could control, and from which no friends could induce him to depart,

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characterized him as brave, honest, and true throughout his whole life. In his profession he achieved success. He was as true to his clients and as zealous in the presentation of their causes as he ever was when called to act in any other field. He had builded upon those principles of the common law which were founded in right and justice.

On April 1, 1874, he was appointed Attorney General of the State by Governor Bagley, and his opinions as such officer at once brought him into public notice throughout the State. Many important questions relative to the rights of the State were raised by the different departments of the State government, and were submitted to him. His opinions were taken up by the public press and published to the world, and they were so logical and forcible, and brought him into such prominence before the public, that upon the resignation of Judge CHRISTIANCY on February 27, 1875, to accept the United States Senatorship, he was appointed and afterwards elected one of the Associate Justices of this Court, which position he held from the time of his appointment, April 9, 1875, to the time of his resignation from the Bench, on February 28, 1883. His opinions are to be found, beginning in the 32d Michigan Report, page 27, the case of *Ludwig v. Stewart,* to the 50th Michigan Report, page 258, the case of *Portman v. Fish Commissioners,* occupying nineteen volumes of the reports.

At the time of his coming upon this Bench it was occupied as his associates by Justices COOLEY, CAMPBELL, and GRAVES,—men who had made the Michigan Reports the most sought for of any of the reports of the western states,—and the fame of these learned Justices extended over the whole country. Mr. Justice COOLEY had already published his great work on Constitutional Limitations, which had gained for its author a widespread reputation

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as a legal writer, and the work was to be found upon the shelves of almost every public and private law library, not only in this State, but in the other states of the Union; and the author was then preparing his works on Torts and Taxation. Justices CAMPBELL and GRAVES had also won great renown by their written opinions published in the Michigan Reports, and followed by the courts of other states; and Justice CAMPBELL had been recognized as a writer of great clearness and force in literary circles. It was among these learned Justices that Judge MARSTON took his seat on April 9, 1875. They were men long trained in their judicial duties, and of mature years. Judge MARSTON was many years their junior, and sitting beside them upon the Bench, as I first saw him on entering the court-room at that April term, my mind was carried back to the political struggles, and I thought how appropriately he had been styled the "Boy from Bay." No one doubted his learning and ability to discharge the duties of that office. He took his place among those gray-haired men as calmly as though he had already grown accustomed to it, and from the outset his promise of usefulness was fulfilled.

He remained on this Bench a little less than eight years. During that time his friends who had urged his appointment and election never for a moment had occasion to regret their course. His opinions are filled with that careful thought and study, and are written with that same vigor, which were manifest in his practice at the bar. He always spoke to the point in controversy, and he always wrote to the point, without any of that circumlocution which characterizes so many judicial writers. Long before the time of his retirement from the Bench he had become recognized by the people of this State, and especially by the bar, as the peer of his associates. He had endeared himself to the bar by his

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manly bearing, his urbanity, his thoughtfulness towards the younger members, and his pleasant and cheerful words of comfort to them. He was the especial favorite of the younger members, and they greatly felt his loss upon his retirement. He felt at that time, undoubtedly, that his continual and arduous duties upon the Bench had begun to undermine his health, and that his duty to himself and his family required his resignation. Upon leaving the Bench, he settled in Detroit with his family, where he lived up to within a few weeks prior to his death. So great was his popularity as a lawyer, and so widespread the belief in his ability and integrity, that he sprang at once to the forefront of the bar of Wayne county and of the State. He built up, in the few years from 1883 to 1891, a large and lucrative practice.

For the last two years of his life his physical strength had greatly weakened; and during the last year so greatly impaired was his health that he was at times confined to his bed for weeks. He still retained through all his physical pain and suffering that same vigorous intellect, and that same kindly greeting was extended towards all who approached him. During the last year, though nearly prostrated by the dread disease which finally took him from us, he appeared before this Court in the case of *State v. Sparrow*, recently decided. He was too weak, physically, to stand during the argument, but though sitting I have never listened to a more clear and logical argument than there presented. He was filled with his subject, and his sentences were so modulated and so eloquent that he seemed like one inspired. This was his last argument before this Court.

He was most happy in his domestic life. He was united in marriage soon after his admission to the bar

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with Emily Sullivan, who still survives him. Four children—three sons and one daughter—are the fruits of their marriage. His family mourn the loss of a loving husband and father, and the bar of the State a generous and well-beloved brother.

I knew him intimately and well, and have loved him these many years. His loss is a personal affliction. He was the soul of honor. He was filled with gentleness. His last days were peaceful. He leaned upon the Arm that is able to save; he has gone to his reward.

Let it be our pleasure, as it will be our duty, to teach those who come after us to imitate the private virtues, remember the public services, and cherish the reputation of this man. What a lesson his life has taught! Who to-day can read the lesson of such a life without the feeling that only in our country and under our institutions could a boy, especially of foreign birth,—however bright, however strong intellectually and morally,—raise himself from poverty and lowliness, without the aid of influential friends, to the position of Chief Justice of the Commonwealth, the highest position in the gift of the people? It teaches its lessons to our youth. It teaches them to love our country and its institutions; to thank God that under His guidance and care our fathers builded here on this continent such a government.

By Chief Justice MORSE:

I heartily concur in all that has been said by the bench and bar in praise of Judge MARSTON.

He was a useful man; a citizen of positive convictions as to duty, which he always fearlessly avowed; an able, upright, and energetic lawyer; an honest, learned, and conscientious judge. There was no time-serving element in his nature, and hypocrisy in anything was hateful to him. He was frank and open as the day in all his inter-

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course with his fellows, whether as friend, neighbor, advocate, or judge. For this he was well beloved by all who knew him.

As an advocate at the bar, he had few, if any, superiors in this State. And his client always had the full benefit of his great powers, for he was a tireless and faithful worker.

His fidelity to what he believed to be right led him, while yet a mere "Boy from Bay," to bolt the nomination by his political party of a candidate for Congress whom he believed to be unworthy of the place, and by his energetic and fearless work upon the hustings he compassed his defeat.

His fidelity to what he believed to be right as a lawyer was equally steadfast and fearless, at all times and under all circumstances. It was impossible for him to deceive a client or to neglect his business; nor yet would he, even in his client's interest, seek to deceive the court. He was as frank and honest in the presentation of legal questions as he was in his every-day life.

His work upon this Bench has been justly eulogized. His labors before us as an advocate and counselor have always been in aid of the Court, and, as he believed, in the interest of justice. As a friend and companion he was the most genial and unselfish of men; and there is not one who knew him but will mourn that we, and the world, must lose, so untimely as years are counted, the benefit of his knowledge of the law, his wonderful energy and industry in his profession, the fearless honesty of the man, the love and kindly spirit of one who was indeed the friend of all mankind.

It is ordered that these resolutions here presented, and the remarks thereon, be printed in the reports, and that a suitable memorial page be dedicated to his memory;

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and as a further mark of respect the Court will stand adjourned for the day.

The following communication was received:

HON. A. B. MORSE, Chief Justice Supreme Court.

My Dear Sir: As a student in the office of the late Judge MARSTON for nearly a year immediately after my admission to the bar, I wish to express my appreciation of the friendship then formed and continued thereafter, my acknowledgment of his kindness and good-will, and my regard for his memory. With feelings of sorrow for the loss, I realize how difficult it is to clothe those feelings in appropriate language.

I became acquainted with the late Judge MARSTON in April, 1874, immediately after his appointment by Governor Bagley as Attorney General. With limited knowledge of the practice of the law, I now appreciate better than ever the value and aid of his methods and manner of work. I was in his office in Lansing, and the place afforded me an excellent opportunity for study and acquaintance. He was a quick and rapid worker, and a lover of intellectual work. He endeavored to find, if possible, the principle and reason for the law, and to apply the same to the facts and the question under consideration. He was always ready to encourage and assist the younger attorneys with whom he was associated; but he impressed them with the necessity of relying upon themselves.

After he left the Bench, our former acquaintance became closer and nearer; and he was always willing to offer aid and suggestions whenever sought.

His death, for many days, brought a flood of memories of the past; what he did, and how he did it; what was the hope of his youth, or the ambition of his early life.

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I apprehend that they were to a large extent fully realized.

The story of his life, as known to many of this bar from his youth,—alone, with confidence in himself and in his abilities; the persistent devotion, at first under adverse circumstances, to his profession, but with success; his election on this Bench at the age of thirty-six; his work while Judge; his subsequent success in the practice, all crowded into the space of fifty-two years,—reads more like fiction than the real life of a man whose death to-day fills our hearts with sorrow. It affords a rich field for reflection. How true:

> "We live in deeds, not years; in thoughts, not breaths;
> In feelings, not in figures on a dial.
> We should count time by heart-throbs. He most lives
> Who thinks most, feels the noblest, acts the best."

> "One crowded hour of glorious life
> Is worth an age without a name."

When his name was prominently mentioned as the successor of Judge CHRISTIANCY, while talking with me about it before his nomination, he expressed his apprehension that it would not be wise to accept it, on account of his age; that the bar would not have confidence in him; but his success dispelled such doubt.

His life is a forcible illustration of the saying that it is not the number of years we live, but how well, and that well-directed efforts to one's life work seldom fail to be recognized, and to merit and reap reward.

Judge MARSTON possessed the happy faculty of making friends and acquaintances, and he was fortunate in the friends which he made from the time he began the study of the law. His life presents a strong illustration of two features of the present age:

First. The possibilities of life. It is not often that we find a better example. Ambitious, energetic, and faithful in his work, from a humble beginning, without

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the aid of parents, possessed and endowed with the talents peculiar to the Scotch-Irish people, whose intellectual force and brightness have shone in so many professions in the last two hundred years, he reached success, and rapidly rose to the front ranks of his profession, fulfilling the hopes of his friends and the promise of early life. Not unworthy of the promotions, he has given a result of the possibilities of life which the profession and people of Michigan should remember. At no time and in no country could these possibilities have found so ready a recognition or fruition.

Second. His life also furnishes a bright example of having one's abilities equipped and ready for occasions. It is said that circumstances make men; but, while it is true in part, men must be ready and prepared for the circumstances when they come. His appointment to the office of Attorney General was on account of personal friendship between him and Attorney General Ball, his predecessor. His election to the Supreme Bench was due to a large extent to the thoroughness and success of his work as Attorney General. These promotions came because he was prepared to accept and to do the work expected. They would not have come to him had he not done the work of his profession thoroughly and carefully.

His love for his home and family, first and nearest his heart, and their comfort and happiness a source of delight; true to his friends and generous to all; frank in his manner and nature; thorough and conscientious in his work; successful in his profession; happy in his associations and faithful in his trusts,—he was a man whose friendship, success, and memory it is wise and respectful in the hurry of these days for us to remember, and tenderly to pay a tribute of affection, and around which to wreath a garland of fitting words.

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Beyond the borders of Michigan, her brightest reputation is her educational institutions. How wisely the originator—the Rev. Mr. Pierce—of her school system planned and builded; alike open to the son of the humblest peasant, to the orphan boy inspired with a love of knowledge, and to those more favorably situated. With gratitude and thankfulness the sons of Michigan, by birth or adoption, accept and remember these privileges. With pride and admiration Michigan points to her sons who achieve renown and success by reason of these institutions. He to whose memory we pay our tribute to-day gladly embraced these priceless opportunities. His life is an example of what these educational facilities accomplish. Proud are the sons of Michigan of their State; but the State may well be proud of such a son.

Toledo, Ohio, February 1, 1892.

GEO. P. VOORHEIS.

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OCTOBER TERM, 1891.*

MARTIN L. SWEET v. JAMES W. CONVERSE, DAVID P. CLAY, NIRAM A. FLETCHER, DAVID D. ERWIN, AND THE NEWAYGO MANUFACTURING COMPANY.

Creditors' bill—Fraud—Who may complain—Parties—Pleading.

1. For a misjoinder of parties defendant those only can demur who are improperly joined; citing Story, Eq. Pl. § 544.
2. The terms of a demurrer should suggest the errors complained of, and, when two defendants join in a demurrer for want of equity solely, neither can be allowed to raise a question not available to both.
3. An attorney for a mortgagee, who is charged with actively participating with his client in the fraudulent foreclosure of the mortgage, whereby all of the mortgagor's property was absorbed to the injury of creditors, is a proper, though not a necessary, party to a bill filed by a judgment creditor for an accounting and the payment of his judgment.
4. Where a judgment creditors' bill alleges that the mortgagor and a receiver appointed in the foreclosure suit fraudulently conspired together to enable the mortgagee to get possession of all of the mortgagor's assets for a nominal consideration, and that the conspiracy was successful, it is not necessary to aver that as a consequence there were no assets with which to pay complainant's judgment, or that the conduct of the defendants operated as a fraud upon other creditors, or that the intent was to defraud them.
5. Where a mortgagee of a corporation, its president, and the receiver appointed in the foreclosure suit conspire to, and do,

88	1
92	186
88	1
95	163
88	1
97	69
88	1
98	615
98	660
88	1
101	608
88	1
102	471
88	1
106	25
88	1
127	165
88	1
128	200
d128	201
88	1
142	454

*Continued from Vol. 87.

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conceal the mortgagor's property from bidders at the foreclosure sale, neither the conveyance by the receiver, nor the confirmation of the sale by the court, secured by a fraud upon it, can protect such property as against existing creditors.

6. The rule that a right of action for fraud is non-assignable has no application to an assignment of something which is in itself tangible and capable of delivery, and involving a right of property, but in such a case the right to whatever remedy the assignor has follows the assignment.

7. The following general propositions are summarized from the opinion of Mr. Justice McGRATH:

a—Acts are constructively fraudulent as to creditors when injurious to their rights, without of necessity involving *actual* fraud or an intent to defraud; citing *Hinchman v. Tower*, 10 Mich. 513.

b—If the conduct of a party is such as, in its tendency and result, to operate to defraud others, it will be deemed fraudulent, although no such purpose was intended; citing *Putnam v. Reynolds*, 44 Mich. 115.

c—Where there is *actual* fraud in obtaining the property of an insolvent, the party acting fraudulently will be presumed to have intended the results which followed that conduct.

d—A fraud upon a debtor by one creditor, whereby such creditor is enabled to absorb *all* of the debtor's property, to the exclusion of other creditors, operates as a fraud upon them, and they have a right to complain, especially where the debtor is in collusion with the overreaching creditor.

e—A secured or an unsecured creditor has no right to so fraudulently use his security or judgment as to deprive other creditors of their rights in the debtor's property.

f—A judgment obtained by fraud and collusion, under which it is sought to absorb a debtor's property to the exclusion of creditors, may be repudiated; and equity will relieve against a judgment where the defendant (complainant) was prevented from making his defense at law by the fraudulent conduct of the plaintiff (defendant); citing *Burpee v. Smith*, Walk. Ch. 327.

Appeal from Kent. (Grove, J.) Argued July 2, 1891. Decided October 9, 1891.

Bill to reach assets in the hands of an alleged fraudulent holder. Defendants Converse and Fletcher appeal

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from decree overruling joint general demurrer. Decree affirmed. The facts are stated in the opinion.

Eggleston & McBride, for complainant.

Uhl & Crane, of counsel for complainant, contended:

1. A general demurrer will not lie if any relief whatever is warranted by the bill; citing *Hawkins v. Clermont*, 15 Mich. 511; and the only question before the Court is "whether there is any matter in the bill upon which any equitable relief whatever could be justified;" citing *Hoffman v. Ross*, 25 Mich. 175.
2. The judgment creditors, upon the return of their executions unsatisfied, had a legal right to file a creditors' bill; citing How. Stat. § 6614; and complainant, *as assignee*, had a like right to file a bill to set aside the fraudulent transactions alleged in his bill; citing How. Stat. § 6205; and he was not required to cause executions again to be returned unsatisfied before so doing; citing *Rankin v. Rothschild*, 78 Mich. 10.
3. The jurisdiction of courts of equity to set aside a decree obtained by fraud, on an original bill filed for that purpose, has long been unquestioned; citing Freem. Judg. § 486; and the court had jurisdiction to vacate the foreclosure decree, if obtained by fraud, in order to protect the equitable levy of the complainant (*Edson v. Cumings*, 52 Mich. 52), which was created upon the effects of the judgment debtor by the filing of the bill and the service of subpœna; citing *Beck v. Burdett*, 1 Paige, 305; *Corning v. White*, 2 Id. 567; *Storm v. Waddell*, 2 Sandf. Ch. 494; *Miller v. Sherry*, 2 Wall. 237; *Sedgwick v. Menck*, 6 Blatch. 156; *Brown v. Nichols*, 42 N. Y. 26; *Adsit v. Butler*, 87 Id. 585; *Bank v. Gage*, 93 Ill. 172.
4. The defendant Converse obtained a conveyance of the property of the judgment debtor by fraudulent means and corrupt practices, and the court will consider him a trustee for the purpose of administering equitable relief; citing *Huxley v. Rice*, 40 Mich. 78.
5. The sale of the property of the Newaygo Manufacturing Company to Converse, under the decree made in the foreclosure proceedings, is null and void as against complainant, by reason of the fraudulent and corrupt practices of the defendant Converse to bring it about; citing *Johnson v. Waters*, 111 U. S. 640; *Decker v. Decker*, 108 N. Y. 128.
6. The defendants, upon this hearing, can derive no advantage from the omission from the bill of the following allegation, required by Chancery Rule No. 102, namely: "That he knows,

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or has reason to believe, the defendant has equitable interests, things in action, or other property, exceeding one hundred dollars in value, exclusive of all prior claims thereon, which the complainant has been unable to discover and reach by execution on such judgment or decree." This defect would only be open upon *special* demurrer, as a general demurrer challenges the equity of the case made by the bill, and must be overruled if a case for equitable relief is set out, however imperfectly; citing *Glidden v. Norvell*, 44 Mich. 202; *Day v. Cole*, 56 Id. 294.

7. As the bill alleges that Converse has transferred this property to the Converse Manufacturing Company, *the proceeds are not in a situation to be levied upon;* hence the complainant, upon this bill, if sustained by proofs, would be entitled to a decree against the defendant Converse for the amount of his judgments, interest, and costs; citing *Reeg v. Burnham*, 55 Mich. 39.

Fletcher & Wanty, for appellants, contended:

1. It must be apparent, at first glance, that there was no excuse whatever for making any person but Converse and the Newaygo Manufacturing Company defendants; and, as a matter of fact, Fletcher and Erwin were made parties simply for the purpose of spreading upon the records a lot of scandalous charges against them. The bill was not filed for discovery or relief against any defendant except Converse, and an answer under oath is waived, in which case discovery cannot be asked of a defendant; citing *Torrent v. Rodgers*, 39 Mich. 85; and since by statute parties are made general witnesses, a bill of discovery cannot be filed; citing *Shelden v. Walbridge*, 44 Mich. 251.
2. It is not alleged that the Newaygo Manufacturing Company conveyed its property to Converse to defraud its creditors, but the sole ground of complaint is that Converse has defrauded the corporation, the alleged fraud having been consummated 15 months before complainant purchased the judgments he seeks to collect, which brings the case within the decisions in *Brush v. Sweet*, 38 Mich. 574; *Dickinson v. Seaver*, 44 Id. 631; *Dayton v. Fargo*, 45 Id. 153.
3. We submit that no case can be found in which a creditor has been allowed to attack transactions between a debtor and third parties where no pretense is made that the object was to defraud the creditor. It has been often said that a creditor cannot redress the wrongs done to his debtor. He cannot claim damages for a trespass or for a deceit, and to permit him to step in and interfere between a debtor and the persons with

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whom he deals would be giving him the same rights in his debtor's property as the debtor himself has. In some of the cases in which this question has been discussed, it has been claimed that a court of equity could interfere in such transactions; but we submit that in no case has a court done such a thing, and that whenever a creditor has gone before a court seeking such relief he has been defeated; citing *Prosser v. Edmonds*, 1 Younge & C. 481; *French v. Shotwell*, 5 Johns. Ch. 555; *Crocker v. Bellangee*, 6 Wis. 645; *Hovey v. Holcomb*, 11 Ill. 660; *McAlpine v. Sweetser*, 76 Ind. 78; *Eaton v. Perry*, 29 Mo. 96; *Graham v. Railroad Co.*, 102 U. S. 148; *Lewis v. Rice*, 61 Mich. 97; *Pettus v. Smith*, 4 Rich. Eq. 203.

4. The Newaygo Manufacturing Company could not retry the questions disposed of in the foreclosure suit, and in the absence of fraud and collusion as to a judgment or decree, neither of which is alleged as to this decree, no creditor can afterwards retry them for the debtor; citing *Rogers v. Rogers*, 3 Paige, 379; *Mattingly v. Nye*, 8 Wall. 373; *Marsh v. Pier*, 4 Rawle, 288; *Candee v. Lord*, 2 N. Y. 275; *Decker v. Decker*, 108 Id. 128; and complainant, being a party to the foreclosure suit, is concluded as to all of the questions decided therein.

McGRATH, J. This is a bill in the nature of a judgment creditors' bill to reach assets in the hands of an alleged fraudulent holder.

From the bill of complaint it appears that in December, 1886, three judgments, aggregating $2,300, were recovered in the Newaygo circuit court against the Newaygo Manufacturing Company; that executions were issued thereon, and were returned unsatisfied; that in March, 1890, these judgments were assigned to complainant.

It further appears that the Newaygo Manufacturing Company had been operated as a feeder to a railroad in which defendants Converse and Clay were largely interested, and to whom it was largely indebted; that after the railroad had been enabled to pay off its indebtedness, and declare a large margin of profit, the Newaygo Manufacturing Company was largely indebted to various parties, and especially to Converse; that a large part of

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its indebtedness, and all of its indebtedness to Converse, was secured by Clay's indorsement; that Clay was the holder of 90 per cent. of the stock of the Newaygo Manufacturing Company, and was president of that company; that, to secure Clay upon his indorsements, the company executed to him a mortgage of $250,000, and afterwards, to secure Converse, it executed a mortgage to him for about $200,000; that these mortgages were executed as a part of a fraudulent scheme to get possession of the assets of the Newaygo Manufacturing Company; that within three months some of the notes indorsed by Clay were allowed to go to protest, and the bank holding them filed its bill in the Kent circuit court to foreclose the first-named mortgage; that Converse came in, proved up his claim, and the same was declared to be a lien upon the property under the mortgage; that the defendant Erwin was appointed receiver, and the defendant Fletcher acted as attorney for Converse; that defendants controlled the foreclosure proceedings, and fraudulently conspired to inflate the indebtedness and conceal and depreciate the assets, so as to enable Converse to buy up the outstanding claims covered by the mortgage at one-fourth of their par value, and to purchase the assets of the company at much less than their real value; that Converse was enabled by these fraudulent methods to secure a large part of the secured claims at one-fourth of their actual value, and to purchase the assets of the company, which had been inventoried by the receiver at $448,000, for the sum of $76,000; that to reach this result defendants fraudulently withheld from the records a deed of certain valuable property, concealed the fact that the company had a valuable equity of redemption in another valuable tract, and concealed from bidders the actual situation of other valuable assets; that Converse has since formed the Converse Manufacturing Company,

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with a capital stock of $150,000, and has conveyed the property so acquired to said company for the sum of $350,000; that all the stock in said company, except stock of the value of $300, is held by said Converse.

The bill prays that defendant Converse may be decreed to account for the assets of the Newaygo Manufacturing Company, and to pay complainant's judgment, and for general relief.

Defendants Converse and Fletcher jointly demur for want of equity. The first point presented is that the defendant Fletcher is improperly made a party, and that as to him the demurrer must be sustained. The pleadings, however, do not raise that question. For a misjoinder of parties defendant those only can demur who are improperly joined. Story, Eq. Pl. § 544. A proper or necessary party cannot demur to the joinder of an improper party. The demurrer here is joint, not several; and while it is true that a demurrer may be good as to one defendant, and bad as to others (1 Barb. Ch. Pr. 108; *Barstow v. Smith*, Walk. Ch. 394), that is so only where defendants sever their pleas or demur specially. The terms of a demurrer should suggest the error, and, where two parties defendant join in a demurrer for want of equity solely, neither can be allowed to raise a question which is not available to both. In *Barstow v. Smith, supra*, the demurrer, although joint, was special.

A general demurrer for want of equity will not be sustained, unless the court is satisfied that no discovery or proof properly called for by or founded on the allegations in the bill can make the subject-matter of the suit a proper case for equitable cognizance. When a new cause of demurrer is assigned *ore tenus*, the cause must be co-extensive with the demurrer. *Clark v. Davis*, Har. Ch. 227, 235.

But, irrespective of the question of pleadings, Fletcher

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is a proper, although he may not be a necessary, party. Fraud is alleged, and specific acts are set forth with clearness and particularity, and the bill makes Fletcher an active participant therein. In cases of this nature, if any charge of fraud is made in which the attorney participated, and such participation is set up in the bill, the attorney may properly be made a party, although he may not be a necessary party. Story, Eq. Pl. § 232.

It is urged that the bill does not allege that the company conveyed its property to Converse to defraud its creditors, but that Converse had defrauded the company of its property, and that the right to complain of a fraud is not assignable; that it is not alleged that there was any fraud in the decree in the foreclosure proceedings, hence the judgment is conclusive.

While the bill sets forth that Converse defrauded the company, it also alleges that Clay, the owner of 90 per cent. of the stock of the company, and its president and manager, together with the receiver and the other defendants, fraudulently conspired together to enable Converse to get possession of all of the assets of the company for a nominal consideration, and that as a result of such conspiracy Converse succeeded. It was hardly necessary to aver that in consequence there were no assets to apply to the liquidation of the claim in question, or that the conduct of defendants operated as fraud upon other creditors, or that the intent was to defraud creditors.

Acts are constructively fraudulent as to creditors when injurious to their rights, without of necessity involving actual fraud or intent to defraud them. *Hinchman v. Town*, 10 Mich. 513. If the conduct of a party is such as, in its tendency and result, to operate to defraud others, it will be deemed fraudulent, although no such purpose was intended. *Putnam v. Reynolds*, 44 Mich. 115. Where there is actual fraud in obtaining the prop-

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erty of an insolvent, the party acting fraudulently will be presumed to have intended the results which follow that conduct. A fraud upon a debtor by one creditor, whereby such creditor is enabled to absorb all of the debtor's property, to the exclusion of other creditors, operates as a fraud upon such other creditors, and they have a right to complain, especially where the debtor is in collusion with the overreaching creditor. A secured creditor or an execution creditor has no right to so fraudulently use his security or his judgment as to deprive other creditors of their rights in the debtor's property.

"The fact that a transfer of a debtor's property with intent to defraud his creditors is accomplished through the agency of a valid judgment, lawfully enforced, does not alter its fraudulent character, or enable it to defy justice. A judgment may often be made an effective agency in accomplishing, beyond its own legitimate purpose, a further result of fraud and dishonesty, and may even be selected as the suitable means by reason of its inherent character. The complaint here is not of the judgment, but of the use that was made of it." *Decker v. Decker*, 108 N. Y. 128; *Candee v. Lord*, 2 Id. 269.

Even a judgment obtained by fraud and collusion, under which it is sought to absorb a debtor's property to the exclusion of creditors, may be repudiated; and in *Burpee v. Smith*, Walk. Ch. 327, it is held that equity will relieve against a judgment at law, where complainant was prevented from making his defense at law by the fraudulent conduct of the defendant.

Here it is not the decree that is complained of, but the use that was made of it. It is alleged that Converse, Clay, the president of the company, and the receiver conspired to conceal, and did conceal, the debtor's property from bidders, and, as to such property, neither the conveyance by the receiver, nor the confirmation of the sale by the court, secured by a fraud upon it, can protect it as against existing creditors.

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It is true that the law will not encourage speculation in the naked right to complain of a fraud, but a clear distinction is made between an assignment of a naked right to complain of a fraud and the assignment of a liquidated claim or judgment in favor of a creditor.

The cases cited by defendants' counsel are clearly distinguishable from the present case.

In *Brush v. Sweet*, 38 Mich. 574, the Court held that such an arrangement as was entered into between the executors of Robert Hyslop and Barnard was invalid in equity, and dismissed the bill.

In *Dickinson v. Seaver*, 44 Mich. 624, the claim was 15 years old, and involved nothing that would keep it alive, unless the fraud would do so; hence the assignment was of nothing more than an action for fraud.

Dayton v. Fargo, 45 Mich. 153, was an action on the case for deceit, which the Court held was not assignable. The Court say:

"The general doctrine, both at law and in equity, has always been that nothing is assignable that does not directly or indirectly involve a right of property. It has been held repeatedly in this State that equity will not enforce the demands of an assignee of a right to sue for fraud when the cause of action is confined to that."

In *Lewis v. Rice*, 61 Mich. 97, the Court held that, in an action at law, creditors could not undertake to redress wrongs against their own debtor.

In *Prosser v. Edmonds*, 1 Younge & C. 481, the court expressly distinguish that case from one of "an assignment of a chose in action, as a note not negotiable, or a bond, or a mortgage, or an equity of redemption, when possession of the thing assigned is delivered to the assignee."

In *Pettus v. Smith*, 4 Rich. Eq. 203, the court say:

"In one case, and only one, that now occurs to me,

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has a creditor a right to ask redress in relation to a fraud upon his debtor; and it is where the fraud was perpetrated, not only with the view of injuring the debtor, but also with an intent to affect the creditor himself, *i. e.*, where the creditor was the object of the fraud. In that case, perhaps, as well as in the familiar case where the debtor colludes with a third person to defraud his creditor, the creditor has a right to claim redress. But with regard to frauds intended to light on the debtor alone, and when his creditors were not within the contemplation of the author of the wrong, and are only affected consequently by it, society could not move on upon any principle that would allow them to interfere, forensically, in such cases."

In *French v. Shotwell*, 5 Johns. Ch. 555, a subsequent purchaser sought to set aside a judgment lien on the ground of a fraud upon the judgment debtor, and the court say:

"If a judgment was fraudulent by collusion between the parties to it, on purpose to defraud a subsequent purchaser, the case would present a very different question. But if the judgment was fraudulent only as between the parties, it is for the injured party alone to apply the remedy."

Graham v. Railroad Co., 102 U. S. 148, decides simply that a subsequent creditor cannot complain unless the fraud is aimed at him.

These cases discuss two questions, viz.:

1. The right of a creditor to complain of a fraud against his debtor, when such fraud is aimed at the debtor only; and

2. Whether an action for fraud is assignable.

As already said, a fraud upon an insolvent, which enables the perpetrator to absorb all the debtor's property, to the exclusion of creditors, operates as a fraud upon creditors, and they have a right to complain whether the debtor sees fit to complain or not. His acquiescence in such case is no more conclusive upon his creditors than

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his voluntary conveyance would have been. In equity, such a fraud will be deemed to have been aimed at creditors as well as the debtor. It is sufficient in such a case that the intent was to fraudulently obtain the debtor's property.

All of the cases cited concede that the rule contended for, that a right of action for fraud is not assignable, has no application to an assignment of something which is in itself tangible, capable of delivery, involving a right of property. In such case, the right to whatever remedy the assignor has follows the assignment. Here valid judgments were assigned to complainant. They would have survived to the personal representatives of the assignors. Complainant does not set up a right acquired by assignment from the Newaygo Manufacturing Company. It has nothing to assign but a naked right to bring suit. Complainant may avail himself of any remedy open to his assignors; nor does the fact that he, before these judgments were assigned to him, proved up in the foreclosure proceedings a claim then held by him, which was declared to be secured by said mortgage, affect this right.

The decree of the court below is affirmed, and the demurrer overruled, with costs to complainant. Defendants will have 20 days to make answer to said bill.

MORSE, LONG, and GRANT, JJ., concurred.

CHAMPLIN, C. J., took no part in the decision.

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RICHARD H. STEVENS v. WILLIAM W. HANNAN.

[See 86 Mich. 305.]

Re-issue of note—Payment—Bona fide holder.

1. Upon a re-examination of the record and of the questions involved, the Court finds no reason for changing its former opinion, reported in 86 Mich. 305.
2. The following general propositions are summarized from the opinion of Mr. Justice MCGRATH:
   a—A single promisor may re-issue his own note, and cannot be allowed to set up a prior payment as a defense.
   b—An indorser who is not directly liable may take up and re-issue a note, the promisor not being in such case prejudiced.
   c—When a note is paid by one of two joint promisors, who is directly liable thereon for its whole amount, the prior contract cannot be revived against his co-signers; citing *Hopkins v. Farwell*, 32 N. H. 429; *Patch v. King*, 29 Me. 448; and it has been held to be immaterial whether the re-issue is made before or after the maturity of the note; citing *Gordon v. Wansey*, 21 Cal. 77.

Application by plaintiff for rehearing of case reported in 86 Mich. 305. Submitted June 29, 1891. Rehearing denied October 9, 1891. The facts are stated in the opinion.

Bowen, Douglas & Whiting, for motion.

H. E. Spalding (*John D. Conely*, of counsel), *contra.*

MCGRATH, J. Upon a re-examination of the record, and the questions involved herein, I find no reason to change the opinion heretofore filed. The note in this case was payable on or before one year from its date. Watson, plaintiff's assignor, was one of the joint makers. Watson took by assignment, indorsed upon the note, from the payee. Plaintiff had notice of Watson's rela-

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tions to the note, and when he received the note from Watson he had notice that the note had been issued to Batchelder, that it had been taken up by Watson, and through Watson plaintiff acquired it.

A single promisor may re-issue his own note, and he cannot be allowed to set up a prior payment as a defense. An indorser who is not directly liable may take up a note, and re-issue it. The promisor, in such case, is not prejudiced. But when one of two joint promisors, who is directly liable upon the note for its whole amount, pays such note, the prior contract cannot be afterwards revived against his co-signers. *Hopkins v. Farwell*, 32 N. H. 429; *Patch v. King*, 29 Me. 448. And it has been held that it is immaterial whether, in such case, the re-issue is made before or after maturity. *Gordon v. Wansey*, 21 Cal. 77.

In *Eckert v. Cameron*, 43 Penn. St. 120, the note was offered for discount on the day of its date, and the court in that case, after discussing the cases, say:

"The cases hold there is nothing in the fact that an acceptor or maker of an indorsed note has it in his possession, and offers it for discount before its maturity, to give notice to a purchaser of its payment or extinguishment. Their doctrine is that one who discounts such a note for the maker before it is due, according to its tenor, is an innocent holder for value, and is entitled to recover against any of the parties to it."

In the present case, however, the note matured before the expiration of the year, at the option of the makers. Plaintiff had notice of its issue, and that Watson had taken it up. He cannot be said to be an innocent holder. The makers of this note had jointly agreed to pay it, and, further, that, in case of payment by either, the others should contribute. The contract jointly to pay was extinguished when the note was taken up by Watson, and the obligation to contribute, of which

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plaintiff had notice, took its place. The others then became severally liable to Watson, and it does not matter that the right to enforce contribution did not ripen until the expiration of the year. The former contract would not be revived by a transfer of the note by Watson to plaintiff.

The motion for a rehearing must be denied.

The other Justices concurred.

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DANIEL LOVEJOY AND ELWIN W. LOVEJOY v. JACOB MICHELS.

Sale—Combination to control prices—Public policy—Action for goods sold—Market price.

1. Plaintiffs were manufacturers of machine knives, and shipped to the defendant upon his written order, but without any agreement as to price, two sets of hoop knives, charging him therefor the price fixed by an association embracing in its membership all of the knife-makers in the United States. One of the principal objects of the association was to *keep up prices*, and each member was obligated, under a penalty of $100, to sell only at the prices so fixed, which were subject to change without notice. The defendant had purchased knives of another manufacturer during the two previous years at a lower price, which had been advanced by the association without notice to customers, and which advanced price was charged for the knives ordered by the defendant. The case was submitted to the jury upon the theory that a combination to fix prices was not unlawful if its purpose was to fix *reasonable* prices, and when the defendant sought to show that the price fixed in this case was not a fair market price, but above the market value, the court refused to permit such showing, and restricted the defendant to the *market price*. The plaintiffs recovered a judgment, in the reversal of which all of the Justices concur.

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2. Mr. Justice McGRATH filed an opinion, in which MORSE, J., concurred, holding:

a—In *Richardson v. Buhl*, 77 Mich. 632, it was held that any combination to control prices was unlawful, as against public policy.

b—Independently of the unlawful character of a combination of manufacturers to fix prices, such a price is no better evidence of value than one fixed by any vendor upon his wares, and is not a *market price*, within the contemplation of the law.

c—The market price of an article manufactured by a number of different persons is a price fixed by buyer and seller in an open market, in the usual and ordinary course of lawful trade and competition.

d—In the absence of an agreement, a price fixed by a combination of dealers does not bind the purchaser, nor will the law so far countenance such combinations as to regard prices fixed by them as even evidence of value.

3. Chief Justice CHAMPLIN filed an opinion, holding:

a—In executed contracts of sale upon credit, where the price is not agreed upon at the time of the sale, the law implies an understanding to pay what the commodity is reasonably worth; citing Benj. Sales, § 85; *Acebal v. Levy*, 10 Bing. 376.

b—A price *arbitrarily* fixed by a combination of manufacturers or dealers is not competent evidence to show a *reasonable price* for goods sold by members of the combination.

c—Such combinations are intended to stifle competition, which is a stimulus of commercial transactions, and to substitute that of unconscionable gain, whereby the participants become enriched at the expense of the consumer, beyond what he ought legitimately to pay under a healthy spirit of competition in the business community.

d—The effect of such combinations is the same as that of contracts in restraint of trade, and public policy places its reprobation alike upon both.

e—Combinations to control prices are against public policy, and void, because they have a mischievous tendency, and are injurious to the best interests of the State, which require that all legitimate business shall be open to competition; that the current prices of commodities shall be controlled by the law of supply and demand; that the laws of commerce shall flow in their accustomed channels, and not be diverted by combinations to control prices fixed by the arbitrary decision of interested parties.

f—In executory contracts of sale, where the goods have not been accepted, prices so fixed cannot be recovered; nor are

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they a criterion of the market value or current price in an action brought for goods sold and delivered without an agreement as to price.

g—If there is no market value of manufactured goods, the evidence to establish their reasonable worth must necessarily be the cost of production, which includes the cost of labor and material, and a reasonable profit thereon.

4. Mr. Justice GRANT filed an opinion, concurred in by LONG, J., holding:

a—Associations of manufacturers are not necessarily unlawful, but may be entirely lawful, while an arbitrary price fixed by them will not bind a purchaser who has not expressly agreed to pay it.

b—The price of commodities bought and sold may be fixed by express agreement, by the market, or by the actual value; and this rule applies to daily commercial transactions between buyer and seller, where one orders, and the other completes the transaction by delivering the goods. If there is no express agreement and no market price, the contract is to pay what the commodity is reasonably worth.

c—A market price is one fixed by fair and open competition in an open market, where seller and buyer stand upon an equal footing.

d—If there be a "fair market price," distinguishable in law from the "market price," then there is no such thing as a "market price," binding upon sellers and buyers, unless they contract with express reference to it, but it must be left to a jury in each case to determine what is a fair market value. But a price fixed by a combination of sellers or of buyers is not a market price, and binds no one.

Error to Wayne. (Reilly, J.) Argued June 5, 1891. Decided October 16, 1891.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinions.

Conely, Maybury & Lucking, for appellant, contended as stated in the opinion of Chief Justice CHAMPLIN, and—

1. The court erred, in that he clearly and distinctly indicated to the jury his opinion of the facts of the case, and the verdict

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which he thought ought to be rendered, and in making an attack upon the credibility of the defendant; citing *Perrott v. Shearer*, 17 Mich. 54; *Blackwood v. Broun*, 32 Id. 107; *Hayes v. Hemer*, 36 Id. 376; *Richards v. Fuller*, 38 Id. 653, 656, 657; *Railroad Co. v. Kirkwood*, 45 Id. 51, 53; *People v. Lyons*, 49 Id. 82; *Wheeler v. Wallace*, 53 Id. 355, 362; *Chase v. Iron Works*, 55 Id. 139; *Springett v. Colerick*, 67 Id. 362. 371; *Davis v. Gerber*, 69 Id. 246, 253; *People v. Gastro*, 75 Id. 132.

Bowen, Douglas & Whiting, for plaintiffs, cited no authorities, and contended that—

1. The price charged for the knives was the market price, and such a price as Michels would have to pay if he bought them of any other dealer. It was a reasonable price, and no testimony was introduced to show that any unreasonable or unfair profit was made in charging it, or that similar knives could be made for any less sum and yield a fair profit.
2. This association was simply an organization of all of the knife manufacturers in the country, which, like hundreds of other associations of the same character, was doubtless organized for mutual advantage and protection. Its purpose was at stated intervals to call its members together, compare their experience in business, and fix upon such a schedule of prices as would yield to all a fair but not an unreasonable profit; and every member had an equal voice in fixing these prices, and in doing so they exercised their best judgment and experience.
3. The questions as to the reasonableness of price, whether the acts of the association were unlawful or not in fixing such price, and whether it was a proper one or not, were all properly submitted to the jury, who found in favor of the plaintiffs, and the judgment should stand.

McGRATH, J. Defendant is a manufacturer of machines for cutting hoops, in which certain knives are used. He had dealt in the same knives for eight years, and bought from White Bros., of Buffalo, N. Y. One of the plaintiffs called upon defendant in September, 1888, soliciting orders for knives. Prices were talked over, and defendant claimed that he exhibited to the plaintiff bills of knives which defendant had purchased from White Bros., and plaintiff said:

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"We will furnish you them at the same price that you pay White Bros., and give you a better knife."

The bills showed the price per set to be $58.28. Defendant gave no order at that time.

In November following defendant ordered by letter, from plaintiffs, two sets of hoop knives. Nothing was said about prices in the order. Plaintiffs booked the order, and the goods were shipped, one set November 30 and the other December 5. Defendant testified that he was in a hurry for the knives, and that the bills came several days after the knives were received; that when he received the knives the machines were waiting for them, and his customers were waiting for the machines. The sole controversy in the case is as to the price which defendant shall pay for these knives. Plaintiffs claim $72.86 per set, and defendant admits an indebtedness of $58.28 per set.

Plaintiffs admitted that they were members of the Knife-Makers' Association; that this association at that time embraced all of the knife-makers in the United States; that the prices charged by plaintiffs and sought to be collected were fixed by the association; that one of the principal objects of the association was to keep up prices; that the members of said association agreed to sell at the prices fixed by the association, and that, in case of any violation of such agreement, the member violating should forfeit $100; that the prices were subject to change without notice; that during the year 1888 there was a change made by the association, and 20 per cent. added to the price. In answer to questions upon cross-examination, one of the defendant's witnesses said:

"The Knife-Makers' Association was formed 7 or 8 years ago to keep up prices. In the early part of 1889 we [a new firm which had gone into the business in 1889, and was not in the association] cut 10 per cent. on old

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prices, making 30 per cent. off of list. Then, later in the year the association cut 20 per cent. on old prices, being 10 per cent. below us. Then later on they cut 5 per cent. more about holidays, and present prices were made early in 1890, making 45 per cent. off the list. We followed to these figures."

Upon cross-examination of one of the plaintiffs, defendant's counsel sought to ascertain whether plaintiffs were governed in fixing prices by a printed schedule furnished by the association. Objection was made, and the court excluded the testimony, saying:

"The only question is as to the value; it don't make any difference how it was fixed. What could these knives be purchased for in the open market?"

Counsel asked defendant when upon the stand what, in his judgment, was a fair market price for the knives in November, 1888, but the court excluded the testimony, saying:

"Not what the fair market price was, but what the market price was,—what he could buy at from other manufacturers."

Defendant's counsel requested the court to charge the jury as follows:

"1. If you find that it was understood and agreed between Michels and Lovejoy, in September, 1888, that Lovejoy would make and furnish the knives to Michels at the same price as White had theretofore sold them, and that the order in question was given and accepted in pursuance of such agreement, then both parties are bound by it.

"2. If no price was agreed upon, then plaintiffs are entitled to recover the fair market value of the knives.

"3. In arriving at such value, you are not bound by the price fixed by the Knife-Makers' Association.

"4. The Knife-Makers' Association, under the evidence in this cause, was an unlawful combination for the purpose of fixing prices.

"5. In arriving at the fair market value of the knives in question, you will consider all the evidence in the

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case, including the market value both before and after the time in question, and all other items of information as to the value, which have been admitted in evidence before you.

"6. Even if defendant could not have bought the goods elsewhere for less than the price fixed by plaintiffs, yet if you find from the evidence that such price was an arbitrary one, beyond the true value, temporarily maintained by an unlawful combination of manufacturers, then you are not bound by such price, but may fix the true market value from all the evidence in the case."

These requests were refused. The charge of the court contains the following:

"Mr. Michels contends that he had some conversation with one of the plaintiffs in this case in September, when he was here, with reference to making certain knives, and he urges that his understanding at that time was that these knives should be made at the price that he had been paying for them heretofore, although there was nothing said with reference to these particular knives. Now, if there was any such understanding between Mr. Michels and the plaintiffs, why didn't he mention it in the letters that he wrote them after these goods were received? One of these letters was dated January 10, 1889, and it seems, from an inspection of these letters,—and they have been read to you,—that he made no reference whatever, in complaining of the price of these knives, that these knives were made by the plaintiffs for a price agreed upon in September. Now, Mr. Lovejoy says that no such conversation ever took place as claimed by Mr. Michels. Mr. Michels says there was such a conversation. It is for you to determine whether there was or not. If there was, how does it happen that no reference to it was made in these letters to the plaintiffs in January, 1889, after the receipt of these goods?

"Now, there is another thing as bearing upon this price. These goods were made and shipped to Mr. Michels, he claiming that they were, as he supposed, to be $58 a set; but it appears that there was an invoice sent with these goods at the time. Now, if the price was as contended by him, would he not, in the ordinary course of business, have made some complaint at once upon the receipt of

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362; *People v. Gastro,* 75 Id. 127; *Kelly v. Emery,* Id. 147.

The court further charged the jury as follows:

"On the part of the defendant, it is further contended that there was an unlawful combination between the manufacturers of such articles as these, for the purpose of enhancing their price or putting their price beyond the real market value. If that is so, such a combination is unlawful, and the mere fact that the price is fixed in an arbitrary manner like that is not binding upon the jury in determining the real market value of the property. On the part of the plaintiffs, it is admitted that there was such an association or organization of the manufacturers of knives or edge-tools of this country; that they got together, and put reasonable prices only upon their goods. Well, if that is a fact, then there would be nothing unlawful in such a combination as that. If they combine for the purpose of putting a fictitious value upon their goods, or for the purpose of driving small manufacturers out of the business by putting their goods down to a lower price than the market price, and below what they can be made for, and do this for the purpose of ruining such other manufacturers, such a combination is unlawful. It is a question of fact, to be determined from what took place between these men, whether the association was unlawful or not. The fact that there is an association would not justify the inference that it was unlawful or that it was formed for a purpose contrary to law.

"If, without any reason, they put an additional 20 per cent. upon these knives, merely using this power that they had arbitrarily for the purpose of controlling the market, that would be unlawful on their part; but if, on the other hand, as it is claimed, there was a great risk connected with the making of these particular knives, and, on account of the nicety of the work required and the extreme risk, these manufacturers felt that it was just and right and proper, for the purpose of protecting themselves against loss, to fix a fair market price for this work, and they put this 20 per cent. on it, I should say it was a legitimate act."

What I have said in the beginning of this opinion

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if the purpose was to fix reasonable prices, and when defendant sought to show that the prices fixed were not fair market prices, and were above the market value, the court refused to permit him to do so, and restricted him to the market price, when, as a matter of fact, the association embraced all the manufacturers, and the only "market price" was that fixed by the association.

In *Richardson v. Buhl*, 77 Mich. 632, this Court held that any combination to control prices was unlawful, as against public policy. In the present case, as in that, it was claimed that the combination had in fact reduced prices, and upon that point the Court say:

"It is no answer to say that this monopoly has in fact reduced prices. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree."

In the present case no price was agreed upon at the time the order was given, and there was no evidence tending to show that defendant had any knowledge of the price fixed by the association. An attempt is made to fasten a price fixed by a combination upon such a purchaser. It is sufficient to know that the price sought to be imposed is that fixed by the combination. If so, it was unlawfully fixed, and has no force as a market price for that reason. It is the combination for the purpose of controlling prices that is unlawful, and the fact that they, the manufacturers, deemed the prices fixed to be reasonable, does not purge it of its unlawful character.

Independently of the unlawful character of the combination fixing it, a price so fixed cannot be regarded as any better evidence of value than that fixed by any vendor upon his own wares. A price so fixed is not to be entitled to rank as the market price. It is not a market price, within the contemplation of the law. The market

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of defendant is based entirely upon the statement of defendant, which is that he showed Mr. Lovejoy some bills of knives purchased from White Bros., and that Lovejoy said: "We will furnish you them at the same price that you pay White Bros." This conversation was two months or more prior to the written order of defendant. There is not a *scintilla* of evidence tending to show any agreement, or even understanding, that defendant would order goods from plaintiffs in consequence of this statement, or any other. Courts cannot manufacture contracts for parties out of such statements. Did defendant agree to buy? Did he agree to order? If he agreed to do either, when was the contract to be performed? Was this a standing offer to be accepted by defendant at any time in the future? Furthermore, defendant in his written order made no reference to this conversation, nor did he testify that he gave it relying upon Lovejoy's statement. The court left it to the jury to determine whether this conversation constituted an agreement. The alleged erroneous instructions of the court upon this branch of the case become immaterial, for the finding of the jury was such as the court should have instructed them to find.

2. The price charged was $72.86 per set, with 20 per cent. extra used as one knike. From the total bill a discount of 20 per cent. was allowed, leaving the amount claimed $139.89. Defendant admitted his liability for all except 20 per cent., added as hereinafter stated, and amounting to $23.31. This price was fixed by the Machine Knife-Makers' Association of the United States, of which plaintiffs were members, and which then embraced all the knife-makers in the United States. Under its rules, its members were required to charge association prices, under a penalty of $100 for neglect to do so. These knives were what were called "specia

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knives," so made as to form in reality one knife. Evidence on the part of the plaintiffs showed that greater care was required in their manufacture than in that of ordinary knives, and that the price charged afforded a reasonable profit.

Defendant's counsel requested the court to instruct the jury that this combination was unlawful. This the court refused, but did instruct them that an arbitrary price fixed by such an association was not binding upon them in determining the market value of the property, but that there was nothing unlawful in their combining and putting reasonable prices upon their goods; that the fact that there is an association would not justify the inference that it was unlawful, or that it was formed for a purpose contrary to law; that—

"If, without any reason, they put an additional 20 per cent. upon these knives, merely using this power that they had arbitrarily for the purpose of controlling the market, that would be unlawful on their part; but if, on the other hand, as it is claimed, there was a great risk connected with the making of these particular knives, and, on account of the nicety of the work required and the extreme risk, these manufacturers felt that it was just and right and proper, for the purpose of protecting themselves against loss, to fix a fair market price for this work, and they put this 20 per cent. on it, I should say it was a legitimate act."

Associations of manufacturers are not necessarily unlawful. The evidence does not show that the sole object of this association was to control prices. The association might be entirely lawful, while an arbitrary price fixed by it would not bind a purchaser who had not expressly agreed to pay it. The court would certainly have been justified, under the plaintiffs' evidence, in instructing the jury that this 20 per cent. so fixed by this association did not bind the defendant, and did not make a market price. But, in addition to the instruction I have

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above quoted, the court instructed the jury that the combination was unlawful if formed for the purpose of enhancing the price, or putting it beyond the real market value. There was no evidence that the price was unreasonable, or afforded more than a fair profit. The only error in these instructions was in not informing the jury that as to this 20 per cent. there was no evidence of a market value,—for a combination cannot fix a price arbitrarily, and make it the market price,—and that the only question for them was the reasonable worth of the knives. But the failure so to instruct the jury is not complained of. If the case made was one for a jury to determine the "fair" or "real" market value, I think the charge fairly submitted that question to the jury, and that no error was committed in refusing to charge that the association was unlawful.

3. Did the court commit any errors in rejecting testimony offered by the defendant? The defendant was asked by his counsel to state the fair market value of these knives. The court rejected this testimony as incompetent, but limited the question to the market price. It is insisted that this ruling limited him to the price fixed by the association. The price of commodities bought and sold may be fixed in three ways:

1. By express agreement.
2. By the market.
3. By the actual value.

It must be remembered that we are dealing with an executed contract, one of those daily commercial transactions between buyer and seller, where the one orders, and the other completes the transaction by delivering the goods. In such cases the price must be determined in one of the three ways above mentioned. If there be no express agreement and no market price, the contract then is to pay what the commodity is reasonably worth.

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As already shown, there was no express agreement as to price, and no market price. Therefore the only issue to be tried was, was this additional 20 per cent. reasonable, affording only a fair profit to the plaintiffs?

A market price is the price fixed by fair and open competition in an open market, where sellers and buyers stand upon an equal footing. Legally the price so established is fair, and fixes the reasonable worth of the commodity. When the price is high, the purchaser may call it unfair; when the price is low, the seller may call it unfair; but in law both are fair, and, in the absence of any express agreement, seller and purchaser alike contract with reference to it. Upon no other basis can the great commercial transactions of the world be carried on. The immense granaries of this country are filled with products which represent labor, some of which has been remunerative, and other unremunerative, according to the character of the soil and the industry and management of the laborers and other conditions. If the market price of wheat reaches $1.25 to $1.50 per bushel, will a purchaser be permitted by the law to say to the farmer who sells: "That is not a fair market price; it allows you too much profit, and therefore is not binding upon me?" On the other hand, if the market price of the same commodity is so low as not to afford the farmer a reasonable profit, can he say to the purchaser of his grain: "The market is unfair, and affords me no profit, and therefore you must pay more?" If there be a "fair market price," distinguishable in law from the "market price," then there is no such thing as a "market price," binding upon sellers and buyers, unless they contract with express reference to it, but it must be left to a jury in each case to determine what is the fair market value. The same rule must apply to manufactured commodities, the price of which is ordinarily fixed by such

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competition in an open market. But a price fixed by
combination of sellers or of buyers is not a market price
and binds no one. The testimony was therefore, in m
judgment, properly rejected by the court.

4. A witness for plaintiffs testified that if he had mad
the same knives for defendant he would have charged th
same price that plaintiffs charged, and that it was
"fair market price." Upon cross-examination, he wa
asked the price he had manufactured them for before
This testimony was rejected by the learned circuit judg
upon his own motion, and without any objection fron
plaintiffs. This testimony was competent, and shoul
have been admitted.

5. During the progress of the trial the court, in th
presence of the jury, used the following language: "Th
only question is as to the value; it don't make any differ
ence how it is fixed. What could these knives b
purchased for in the open market?" I think these an
other similar remarks were erroneous, for the reason
above given, and tended to mislead the jury; and fo
these errors the verdict should be set aside, and a nev
trial ordered.

I do not think that the defendant presented his cas
upon the proper theory, and therefore no costs shoul
be allowed. The testimony he offered and his requests t
charge were based solely upon the idea of a fair marke
value.

LONG, J., concurred with GRANT, J.

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ALBERT H. PETRIE v. JOHN TORRENT.

Accounting—Equity jurisdiction—Remedy at law—Statute of frauds.

Complainant held a verbal option under which he had the right to purchase certain tracts of pine land, mills, and a lumbering outfit within a given time and at a stated price, or secure a purchaser therefor. Not having sufficient means to make the purchase, he applied to the defendant, who agreed to pay one-half of the expense of examining the timber, and, if such examination proved satisfactory, to furnish the money with which to purchase the land and other property, and to give to complainant one-third of the net profits resulting from the transaction; in consideration of which complainant agreed to pay the remainder of the expense of such examination, and to give to defendant the sole opportunity to make the purchase, and to contribute his services in carrying out the enterprise. The purchase was made at a cost of $769,000, and the title taken in defendant's name, who, with complainant's assistance, sold enough of the lands to amount to over $778,000, and contracted for the manufacture of the remainder of the timber, one-half of the gross receipts of which he was to receive, the value of which timber was estimated at over $300,000. After the defendant had received over $150,000 of such receipts, and on his refusal to account with the complainant for his share of the net profits as per his said agreement, complainant filed a bill for such accounting. And it is held that the duty of the defendant to keep and render to the complainant an account of the *whole* transaction is clear, complainant having a special interest in the profits; and that his bill is properly filed, and that he should not be remitted to a court of law to recover his share of said profits.

88	43
90	965
88	43
95	439
88	43
98	131
88	43
99	68
88	43
100	117
88	43
102	46
88	43
105	483
88	43
s 107	649
88	43
d 118	238
88	43
139	606
88	43
142	150
142	155
142	156
88	43
147	506
148	328

Appeal from Muskegon. (Dickerman, J.) Argued June 9, 1891. Decided October 16, 1891.

Bill for an accounting. Defendant appeals. Decree affirmed. The facts are stated in the opinion.

Bunker & Carpenter (*Blair, Kingsley & Kleinhans*, of

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counsel), for complainant, contended for the doctrine of the opinion, in which their authorities are cited.

Smith, Nims, Hoyt & Erwin, for defendant, contended:

1. The action was prematurely commenced, and in the wrong court. Complainant's right of action had not matured, and he does not pretend to set up any grounds requiring his protection by this court in the matter. It should appear in his bill that adequate relief is not practicable in a court of law; citing *Willson v. Owen*, 30 Mich. 474; *Teft v. Stewart*, 31 Id. 367, 371; *Hagenbuch v. Howard*, 34 Id. 3; *Bridge Co. v. Van Etten*, 36 Id. 210; *Torrent v. Rodgers*, 39 Id. 85; *Edson v. Gates*, 44 Id. 253.

2. Again, if the account was one which might be readily investigated by a jury, the necessity for equitable interference does not exist, and it seems that in that case no equity will arise; and if the facts stated in the bill show no practical difficulty in proceeding at law, a mere indefinite allegation that the accounts are intricate will not prevent a demurrer; citing Adams, Eq. 226; *Monk v. Harper*, 3 Edw. Ch. 109; *Gloninger v. Hazard*, 42 Penn. St. 401; *Foley v. Hill*, 1 Phillips, 399; 1 Pom. Eq. Jur. §§ 130, 131, 139, 140, 424; and cases in which the remedy is mere recovery of money do not ordinarily come in the concurrent jurisdiction; citing 1 Pom. Eq. Jur. § 138; *Badger v. McNamara*, 123 Mass. 117; *Frue v. Loring*, 120 Id. 507; *Ward v. Peck*, 114 Id. 121; *Blood v. Blood*, 110 Id. 545; *Dinwiddie v. Bailey*, 6 Vesey, 136; *Foley v. Hill*, 2 H. L. Cas. 28; *Appeal of Building Association*, 83 Penn. St. 441, 445; *Jewett v. Bowman*, 29 N. J. Eq. 174; *Smith v. Bodine*, 74 N. Y. 30, 33.

Benton Hanchett, of counsel for defendant, contended:

1. It is entirely competent for one to agree to render services to another on the promise of the latter to pay a certain sum for such services upon the happening of a named event or contingency, as on the death of the person, or the arrival of a ship, or the promisor making a profit on the result of a trade, and in such case the remedy for the recovery of the pay for the services rendered is by an action at law, when the contingency upon which the payment is made to depend shall have arisen; citing *Sword v. Keith*, 31 Mich. 247, 254; *Carr v. Leavitt*, 54 Id. 540; *Davis v. Gerber*, 69 Id. 246; *Insurance Co. v. Robinson*, 1 Johns. 616. 623, 624; *Thompson v. Stevens*, 71 Penn. St. 161; and, the remedy being complete at law, a suit in equity will not be sustained; citing *Teft v. Stewart*, 31 Mich. 367, 372;

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Hagenbuch v. Howard, 34 Id. 1; *Bridge Co. v. Van Etten*, 36 Id. 210; *Torrent v. Rodgers*, 39 Id. 85.

2. The case made by the bill is not sustained by the evidence. The case stated in the bill is a simple and distinct agreement to pay *for services* to be rendered by Petrie for Torrent, and it is upon this case only that recovery can be had in this suit, and the evidence which shows a different case cannot be used as a basis of recovery; citing *Ford v. Loomis*, 33 Mich. 121, 122; *Connerton v. Millar*, 41 Id. 608, 612; *Elliott v. Insurance Co.*, 49 Id. 579, 583; *Kelly v. Kelly*, 54 Id. 30, 45; *Huggett v. Case*, 61 Id. 480, 486.

3. Complainant's interest in the lands was this, viz.: Deducting from the value of the property purchased the amount of the purchase price, one-third of what remained would be Petrie's, and Torrent took and held the title to the lands for Petrie's benefit to that extent. This constitutes a trust in the lands; citing 1 Perry, Tr. §§ 2, 82, 122; *Compo v. Iron Co.*, 49 Mich. 39; *Cochrane v. Adams*, 50 Id. 16, 19; *Seymour v. Freer*, 8 Wall. 202, 213, 214; *Culbertson v. Witbeck Co.*, 127 U. S. 326, 334, 335.

4. The agreement which is shown by the testimony of Petrie is an oral agreement for an interest in lands, by which a trust was sought to be created in the lands in his favor. It is within the statute of frauds, and cannot be enforced; citing *Newton v. Sly*, 15 Mich. 391, 396; *Liddle v. Needham*, 39 Id. 147; *Rawdon v. Dodge*, 40 Id. 697; *Hillebrands v. Nibbelink*, Id. 646; *Sutton v. Rowley*, 44 Id. 112; *Shafter v. Huntington*, 53 Id. 310, 315, 316; *Raub v. Smith*, 61 Id. 543; *Pulford v. Morton*, 62 Id. 25, 28; and an oral contract, which is void because within the statute relating to lands, cannot be used for any other purpose; citing *Sutton v. Rowley*, 44 Mich. 112; *Hillebrands v. Nibbelink*, 40 Id. 646.

5. It is not contended that under the agreement as testified to by Mr. Petrie, and the facts related in his evidence, he is without a remedy. The contention is that he is not entitled to the remedy which he seeks by this suit. His evidence shows an agreement which is void by the statute of frauds, under which he claims to have paid money and to have rendered valuable services. In such case the remedy at law is clear to recover for the money paid, and for the value of the services rendered; citing *Scott v. Bush*, 26 Mich. 418; *Sutton v. Rowley*, 44 Id. 112; *Cadman v. Markle*, 76 Id. 448; *Dix v. Marcy*, 116 Mass. 416; *Dowling v. McKenney*, 124 Id. 478, 481.

LONG, J. This bill is filed for an accounting.

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The complainant has for many years been engaged in the general lumber business in this State. He resides at Muskegon. The defendant also resides at Muskegon, and is a lumberman.

The bill alleges substantially as follows:

That the firm of Hannah, Lay & Co., a copartnership of Traverse City, this State, prior to September 23, 1885, were the owners of large tracts of pine timber lands, situate in the counties of Grand Traverse and Kalkaska, this State, and of saw-mills situate at Traverse City and on Long Lake, in Grand Traverse county, and of a lumbering outfit.

That about the 3d day of December, 1885, complainant, after repeated negotiations with Mr. Hannah, of the firm of Hannah, Lay & Co., for the option to purchase said timber lands, saw-mills, and lumbering outfit, entered into an agreement with said firm by which they agreed to give him the first chance of purchasing said properties, or to find a purchaser therefor, in the following spring, or as soon as Mr. Hannah returned from Europe, at the price of $2 per thousand feet for the timber, with the right to the complainant, or whoever he might interest in the matter, to send men upon the lands to estimate the quantity and ascertain the quality of the timber thereon, in order to determine whether to make the purchase of the said properties; and that on Mr. Hannah's return from Europe the following spring the firm would sell to the complainant, or to any person he might find, for the above-stated price, said timber, and also the saw-mills and the lumbering outfit.

That, lacking adequate capital to make the purchase of said properties, complainant set about finding a purchaser therefor, and to that end entered into negotiations with the defendant to induce him to become a purchaser, advising him of the negotiations he had had with the firm of Hannah, Lay & Co.; that on March 10, 1886, he had a conversation with the defendant relative to the purchase of said lands and saw-mills and lumbering outfit, in which conversation it was arranged and understood between him and defendant that said defendant should and would furnish the capital necessary to purchase such lands, saw-mills, and lumbering outfit, provided, on further investigation, it should turn out to be a desirable

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investment; and that it was further arranged, understood, and agreed by and between them that, in order to make said investigation in accordance with the arrangement made with Hannah, Lay & Co., each should select a man to go over and upon said lands to estimate the quantity and ascertain the quality of the timber thereon, to enable the defendant to determine whether he would purchase the same in accordance with complainant's agreement with Hannah, Lay & Co., and, in case no purchase should be made by the defendant, each of the parties should pay the expense incurred by him in employing said men in estimating the timber, and, on the other hand, in case a purchase should be made under such agreement, defendant should pay to the complainant for his services in looking up said tracts of land, saw-mills, and lumbering outfit, in securing the said first chance to purchase the same, and in giving to defendant the sole opportunity to purchase the same, and for all of complainant's services in connection therewith, one-third of the net profits which should be realized from such purchase; and that the defendant on that date, to wit, March 10, 1886, then and there promised and agreed to and with the complainant, for the consideration aforesaid, to pay to the complainant one-third of the net profits which should be realized from the purchase of said lands, saw-mills, and lumbering outfit, on the sale or other disposition of said properties.

That about the 7th of April, 1886, in pursuance of the arrangement, each party employed a man to go upon and over the lands for the purpose of estimating the quantity and ascertaining the quality of the timber thereon; that the men completed their work July 4, 1886, and made their report to the complainant and defendant two days thereafter, and that complainant expended therein about the sum of $1,000.

That while the men were so engaged the parties were informed by Hannah, Lay & Co. that the stumpage price of the timber would be $3 per thousand feet, and that the complainant was laboring under a mistake in supposing the purchase price was $2; that, in pursuance of this communication, complainant had a conversation with defendant, on May 10, 1886, in which it was arranged and agreed that, notwithstanding this modification of the purchase price, the men so employed should complete their work, and that the defendant would make the purchase at the

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increased price, and pay to the complainant one-third o
the net profits which should be realized out of th
purchase.

That from and after the 23d day of September, 188
and up to the time of the purchase by the defendan
complainant faithfully devoted his time, skill, and energ
in securing to the defendant the said properties; that h
conducted all of the negotiations with Hannah, Lay
Co. relative to the purchase, visited Traverse City fre
quently to confer with that firm, and when the optio
had about expired procured an extension, and when th
option so extended had elapsed he procured its restoratio
for a sufficient length of time to enable the defendant t
perfect his arrangements to raise the necessary funds t
make the first payment; that on or about the 15th o
October, 1886, when defendant was wavering with refe
ence to making said investment, and had virtuall
abandoned the hope of making said purchase, he sug
gested to the defendant, and secured from Hannah, La
& Co., a modification of the terms and conditions of th
purchase, and a further extension of the time, by whic
the defendant was enabled to raise the funds for a cas
payment on said purchase.

That about November 7, 1886, in pursuance of sai
arrangements, and in performance thereof, the defendan
purchased said lands, saw-mills, and lumbering outfi
and received proper deeds of conveyance therefor; tha
said defendant paid for said lands, saw-mills, and lum
bering outfit the sum of $769,000, of which amoun
$500,000 was paid in cash, and the balance secured b
mortgage on part of the property conveyed; that for a lon
time prior to the purchase complainant had been activel
engaged, both independently and in connection with defend
ant, in looking up purchasers for portions of said lands an
parts of said property from defendant, in event of hi
purchase from Hannah, Lay & Co., in order to enabl
the defendant to make the purchase; that after the pur
chase he continued his efforts to make further sales fo
the defendant until the entire property had been disposed
of, except that portion covered by defendant's contrac
with the Smith Lumber Company, hereinafter referred to

That prior to July 1, 1887, the defendant, with com
plainant's advice and assistance, had sold all of sai
lands, saw-mills, and lumbering outfit in the county o
Grand Traverse, and portions of the lands in the count

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of Kalkaska, to various persons, firms, and corporations, for the aggregate sum of $778,000 and upwards, which said sum the defendant had received in cash or commercial paper, or securities equally good as cash, and that all of such commercial paper and securities have at this time been converted into cash; and that after making said sales there remained to the defendant a part of said lands situated in the county of Kalkaska, upon which there was upwards of 60,000,000 feet of valuable pine timber, well worth the sum of $300,000 and upwards, which pine timber and lands represented the net profits realized on said purchase.

That on or about December 15, 1886, defendant entered into a written contract with the Smith Lumber Company of Kalkaska, Mich., by which it was to cut, log, and manufacture into lumber the timber from the last-named lands, and sell the lumber so manufactured by it, and turn over to the defendant one-half the gross receipts therefor; that the complainant was consulted by the defendant with reference to making this contract, and with reference to the terms and conditions thereof, and counseled, advised, and aided defendant in all things pertaining thereto; that the said Smith Lumber Company, shortly after making the contract, entered upon the work of cutting the said timber, and manufacturing the same into lumber at Kalkaska, and has since continually been, and is still, engaged in cutting, logging, manufacturing, and selling the same, and has turned over one-half the proceeds of said sales to the defendant; that said defendant has received large sums of money from the proceeds of said sales, which he has appropriated to his own use, and has received monthly, as his share of the proceeds of said sales, in accordance with said contract, from $12,000 to $15,000, and that he has already received, as proceeds from said sales under the contract, upwards of $150,000, which he has appropriated and applied to his own use.

That the moneys so received by the defendant are a portion of the net profits which have been realized on said purchase and sale of said properties, and that the remainder of said net profits is represented by the said lands and the timber thereon, which is upwards of 30,000,000 feet, and worth the sum of $150,000; that the defendant has refused to account to complainant for any

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sums so received as net profits on said purchase, and refuses to pay to him his just portion of the same, or any part thereof; that complainant has frequently applied to the defendant to come to a full and fair accounting respecting said profits, and to pay to him his share thereof, but that the defendant has put him off from time to time, upon one pretense or another, and has finally stated that he would not account for nor pay to him any portion of said net profits until he was ready.

The bill waives an answer under oath, and prays for an accounting of the profits realized by the defendant, and the payment to complainant of his share thereof.

The answer alleges that, in the early part of the year 1886, complainant said to the defendant that he had an option on the lands, lumbering outfit, and property of Hannah, Lay & Co.,—the timber lands at a valuation of $2 per thousand feet for pine timber, and the mills to be taken at a valuation or impartial appraisal to be thereafter made,—and wished him to become interested in the purchase under such option; that defendant expressed a willingness to consider the matter, but entered into no agreement with complainant concerning the same; that the defendant thereafter ascertained from Mr. Hannah, of the firm of Hannah, Lay & Co., that complainant had no option or agreement from that firm of the kind or to the purport or effect alleged by complainant in his bill; that in fact Mr. Hannah had no confidence in the complainant, and would not enter into any transaction of that kind or character respecting said land; that defendant, being desirous of purchasing pine timber lands in the spring of 1886, sent his men upon the lands of Hannah, Lay & Co. to estimate the timber thereon; that such estimate was not made in pursuance of any agreement with the complainant, but for defendant's information, and at his own expense; and he expressly denies that he entered into any understanding or agreement with the complainant to purchase the same, or jointly to estimate the timber upon the lands; or to pay to the complainant any part of the net or other profits that might arise to the defendant therefrom on the purchase of the same. He denies that he had any understanding or agreement with the complainant respect-

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ing the premises or by which each was to employ a man to go over the lands and estimate the timber thereon, but says that he sent a man upon his own responsibility for that purpose, and that he is informed that the complainant did likewise; that he paid the man so employed by him, but is not advised whether the complainant paid any sum for such purposes.

Defendant denies that on or about May 10, 1886, or at any other time, it was understood or agreed between him and complainant that if he made the purchase he should pay to the complainant one-third of the net profits which should be realized on the sale or other disposition thereof, and avers that if complainant expended money in looking up the lands, and employed men therefor, it was at his own risk, and not under the employment, charge, or risk of the defendant in any manner, nor upon any agreement or understanding that defendant should repay him therefor.

Defendant further says that after the negotiations were opened by him with Hannah, Lay & Co. for the purchase of these properties, and while said negotiations were pending, the complainant (who at that time purported to be doing business in the neighborhood of Hannah, Lay & Co., at Traverse City) exercised his neighborly services on one or two occasions to ask the said Hannah, Lay & Co. to extend the time for the completion of said negotiations, but that said conduct on the part of complainant was done by him as a matter of accommodation to defendant, as defendant understood it,—a mere neighborly service; that such acts and doings were at very little time or expense to complainant. Defendant denies that complainant procured any modification of any agreement to purchase from Hannah, Lay & Co., and avers that he had no authority from the defendant to do anything of the kind, nor was he requested so to do by defendant in any way.

The remainder of the answer is a complete denial of complainant's claim in the bill; avers that he has no rights or interests in the lands remaining unsold in the county of Kalkaska; charges that the complainant is justly and equitably indebted to defendant in the sum of over $25,000; and claims the benefit of a cross-bill, and prays for affirmative relief.

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The defendant also denies that the complainant unde his bill is entitled to any relief in a court of equity, an asks the same advantage of his answer as if he ha pleaded or demurred to the bill. After the cause was a issue by filing general replication, the proofs were take in open court in the Muskegon circuit, in chancery, th same as in a suit at law, on which hearing the defendan was not called as a witness, and put in no evidence except the deposition of Perry Hannah, of the firm o Hannah, Lay & Co., and of one John Thorsen, and th following decree was entered:

"1. That the contract set forth by the complainant i his bill of complaint has been fully proved and estab lished; that it is a valid and binding contract betwee the parties thereto; that by its terms the defendant agree to furnish the money to make the purchase, and to pur chase, from Hannah, Lay & Co., of Traverse City, Mich. the lands, timber, and other property mentioned in sai bill of complaint, to sell the same, and to pay to the com plainant for his services and expenses in connection wit the enterprise, and for securing and giving to the defend ant the first chance to purchase said property, one-thir of the profits derived from such purchase and sales; tha at the time the bill of complaint was filed in this caus the complainant had fully and faithfully performed al that was required of him by said agreement; that th defendant had purchased and paid for the property befor mentioned; that he had sold and received payment for al the same, except a certain tract of timbered land in Kal kaska county, in this State; that on the 9th day o November, 1886, with the advice and consent of the com plainant, he had entered into a contract with the Smit Lumber Company of Kalkaska, a corporation organize under the laws of the State of Michigan, for the manu facture and sale of the timber on the before-mentione lands in Kalkaska county; that that contract is stil being executed, and that under it the defendant ha received, as a portion of the proceeds of the timber cu from the Kalkaska county lands, a large sum of money representing in part the profits derived from the pur chase and sales of the property covered by the agreemen

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between complainant and defendant; that when the bill was filed defendant had received from the sales made and from the Smith Lumber Company a sum largely in excess of the amount paid Hannah, Lay & Co. on the purchase of the property, and the expenses consequent thereon.

"2. That the making by the complainant and defendant of said agreement, and the partial execution thereof, established between them relations of such a confidential and fiduciary character as entitled the complainant to a statement from the defendant of the receipts and disbursements connected with the enterprise, and to payment of his share of the profits thereof, and to further statements and payments from time to time of the receipts under the contract with the Smith Lumber Company, and made it the duty of the defendant to render such statements on the request of the complainant, and to pay him his share of the profits at reasonable intervals; that the defendant has refused to render such statements or make such payments to the complainant, and has denied his rights to the same, and to any participation in the profits of the transaction, and defendant has appropriated and converted to his own use all the profit moneys received by him.

"3. That the complainant was and is entitled to a distribution of profits from time to time, and to receive one-third thereof as they accumulate, until the enterprise is finally closed, less such sums, if any, to be left in defendant's hands as would be deemed propor, under the circumstances, to guard against future loss; and, on the termination of the enterprise, complainant will be entitled to a final distribution and payment of his share of all the profits realized, and not previously paid to him.

"4. That an account be taken by this court of all the receipts and disbursements of the complainant and defendant arising out of the contract and relations hereinbefore mentioned and set forth, for the better clearing of which account the parties are to bring in their accounts, and produce before the said court, upon oath, if required, and leave with him, all books and writings in their custody or control relating thereto, and are to be examined upon interrogatories as the said court shall direct; and said court shall also have power to examine other witnesses in relation to said account; and in taking said account he is to make to both parties all just allowances, including such items of interest as shall be just and

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equitable, and is to determine what upon such account ing appears to be due from each party to the other, an also the balance which upon such account shall appear t be due from either party to the other; that, after sai accounting is taken, the defendant shall, on or befor the 15th day of January and July in each year durin the continuance of the enterprise, file with the registe of this court a written statement, under oath, of a moneys received and disbursed by him from or on accoun of said enterprise prior to the first day of such month and of the condition of the property undisposed of, an shall pay to the complainant his share of the profits o the 15th day of January in each year.

"5. This court reserves further consideration of th case, and of all matters therein involved, until after th taking of such account; and either party is at liberty a any time to apply to the court as occasion shall require.

From this decree defendant appeals.

The contention in this Court upon the part of th defendant is:

1. That the case made by the bill of complaint is case for which the complainant has an action at law t recover the agreed compensation for services rendered b complainant for defendant, or to recover for a breach o the contract under which such services were rendered that the remedy is not by a bill in equity, on the ca as it is stated in the bill. It is claimed that the stat ment of the contract in the bill is a distinct contract o employment of the complainant by the defendant in th rendering of services, and to pay for the services rendere a sum which should be determined and fixed by the co tingency of the purchase of the property of Hannah, La & Co., and the realizing of profits from such purchas that, taking the case as thus stated in the bill, the com plainant would be entitled to recover, in an action a law, either one-third of the value of this tract of timb and lands, which represented the profits realized on th purchase, or, if by the terms of the contract it may h contended that the defendant was under obligation t sell the property, and pay over one-third of the proceed and he should neglect or refuse to do it within a reaso able time, the complainant would be entitled to mainta his action for the damages suffered by him by su

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neglect or refusal, which damages would be equal to one-third of the value of the property; that a right of action to recover in such case is as clear as a right of action at law would be to recover for the sum of $100,000 in money, had the agreement been on the part of Torrent that he would pay the complainant for his services the sum of $100,000 in case he should make the purchase from Hannah, Lay & Co., and should make a profit on the purchase.

2. That the case made by the bill is not sustained by the evidence.

3. That the agreement which is shown by the testimony of the complainant is an oral agreement for an interest in lands, by which a trust was sought to be created in the lands in favor of complainant; that it is within the statute of frauds, and cannot be enforced.

4. That it is not contended, under the agreement as testified to by the complainant, and the facts related in his evidence, that he is without remedy, but the contention is that he is not entitled to the remedy which he seeks by this bill.

5. That the complainant cannot recover on the ground that there was a partnership between him and the defendant, as no partnership is averred in the bill, and the agreement which is stated in the bill does not itself constitute a partnership.

6. That the bill cannot be sustained on the ground of fraud; that there is no case of fraud stated in the bill, or any acts which would constitute a fraud.

7. That the bill does not state a case for an accounting.

What are the relations between these parties under the claim made by the bill? The complainant held options upon these properties, under which he had the right to purchase them within a given time, or to find a purchaser therefor. He communicated this fact to the defendant, who agreed to pay one-half the expense to investigate the timber, and, if the investigation was satisfactory, to furnish the money to purchase the entire property. If the purchase was so made, then he agreed to give to the complainant one-third of the net profits

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resulting therefrom. In consideration of this agreemen and undertaking on the part of the defendant, the com plainant was to pay one-half of the expense of th investigation of the timber, and, if the investigatio proved satisfactory to the defendant, then to give hi the opportunity to make the purchase, and to contribut his services in carrying out the transaction. It is allege that the agreement thus made was carried out, and th purchase made, but that defendant refuses to accoun for the profits accruing therefrom.

The complainant trusted the whole matter to th defendant. He had looked the scheme over for the pur chase of the properties, and believed that there was large profit in it. He procured from Hannah, Lay & Co the right to purchase, and let the defendant into th scheme. He worked it up, assisted the defendant t make the purchase, and permitted him to take the whol properties in his own name, in reliance upon his agree ment to account to him for one-third of the net profits From these facts it appears that the defendant accepte the trust, and agreed to carry out the terms and condi tions of the agreement. The complainant had confidenc that the whole matter would be safe in Mr. Torrent' hands, and that as trustee he would faithfully discharg the duties and obligations resting upon him as such Complainant comes into a court of equity for relief, an is met with the proposition that his right to recover i not denied, but that he is attempting to inforce his righ in the wrong forum. We think not. Under the contrac as claimed by the bill, the duty of the defendant to kee and render an account of the whole transaction to th complainant is clear. The complainant has a specia interest in the profits, and he has a right to know ho the account has been kept, what the trustee has done and the balances from time to time since the amount o

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the purchase price has been paid. Equity will retain jurisdiction where fiduciary relations exist between the parties, and a duty rests upon the defendant to render an account.

In *Darrah v. Boyce*, 62 Mich. 486, it was said by this Court:

"It is true, the relation between the parties was not that of partners, but the trust reposed in and the business to be carried on by the defendant, and the accounting he was required to make, were fully equal to those of a partnership, and quite as confidential. * * * He was in possession of all the books and accounts relating to the business, and refused to give any account of sales, or of the place where made, or the amounts received on sales. Some sort of discovery is certainly necessary, and while, to some extent, it may be obtained in a court of law, perfect and complete disclosures as to all these matters may be obtained in a court of equity."

In *Clarke v. Pierce*, 52 Mich. 157, it appears that Clarke filed a bill to obtain an accounting for his share of the proceeds of a certain lumber business carried on upon joint account. The chief contest was concerning Clarke's right to have defendants account for the proceeds of the business, and concerning his share in the results. It was there said by Mr. Justice CAMPBELL:

"We have no doubt that Clarke was to have one-half of the profits, and that he was entitled to compel defendants to an accounting. He is not confined to his remedy at law, whether they were partners or not. The jurisdiction for accounting covers all fiduciary relations where the duty of keeping and rendering accounts exists, and, while there are cases in which the common-law remedy may be adequate, we do not think the present case is such that he ought to be turned out of a court of equity to seek an action at law."

We take it to be the well-established rule that the existence of fiduciary relations between the parties is sufficient to confer jurisdiction upon a court of equity

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whenever the duty rests upon the defendant to render an account. *Bank v. Insurance Co.*, 104 U. S. 54; *Dillon v. Insurance Co.*, 44 Md. 394; *Hargrave v. Conroy*, 19 N. J. Eq. 281; *Garr v. Redman*, 6 Cal. 574; *Bentley v. Harris*, 10 R. I. 434; *Hallett v. Cumston*, 110 Mass. 32; *Channon v. Stewart*, 103 Ill. 541; *Alpaugh v. Wood*, 45 N. J. Eq. 153 (16 Atl. Rep. 676); *Jackson v. King*, 82 Ala. 432 (3 South. Rep. 232); *Pratt v. Tuttle*, 136 Mass. 233; *Seymour v. Freer*, 8 Wall. 202.

In *Seymour v. Freer, supra*, the bill was filed for an accounting upon a contract somewhat similar in its nature to the one under consideration. It was there claimed, as it is claimed here, that for any violation of the contract the complainant had a remedy at law, and that neither he nor his legal representative could have any other. It was said by the court:

"An action at law sounding in damages may undoubtedly be maintained in such cases for the breach of an express agreement by the trustee, but this in no wise affects the right to proceed in equity to enforce the trust and lien created by the contract. They are concurrent remedies. Either which is preferred may be selected. The remedy in equity is the better one. The right to resort to it, under the circumstances of this case, admits of no doubt, either upon principle or authority. Such, in our judgment, were the effect and consequences of the contract."

Under the well-settled rules in this State, however, complainant has no right to proceed in equity if he has an adequate remedy at law; and it is upon this claim that defendant's counsel contend that the proceedings by the complainant should have been at law rather than equity. Counsel for defendant cite upon this proposition *Carr v. Leavitt*, 54 Mich. 540; *Davis v. Gerber*, 69 Id. 246; *Sword v. Keith*, 31 Id. 247; *Bay City Bridge Co. v. Van Etten*, 36 Id. 210. Under the facts in the present

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case and claim made by the bill, we do not think the cases cited by the learned counsel are decisive of this case. Those were actions at law, except *Bay City Bridge Co. v. Van Etten, supra.* In that case a bill was filed for an accounting against the directors of the Bridge company, upon the ground that they fraudulently voted to themselves money for services performed as officers of the company, and wrongfully used the company's moneys. It was there said:

"The complainant seeks to maintain his bill on two grounds:

"1. As a bill to bring the trustees to an account for the misappropriation of moneys belonging to the trust.

"2. On the ground that it saves a multiplicity in suits."

Upon the second ground the Court say:

"There is certainly no multiplicity of suits to be saved, and, * * * if the defendants combined in a fraud, they can be sued jointly at law as well as in equity."

Upon the first ground it was said:

"As to the profits said to have been made by the officers from the use of the company's moneys, we have also general allegations only, and the bill does not aver that the amount is sufficient to give the court jurisdiction on that ground alone."

We are therefore of the opinion that the bill was properly filed for the accounting, and the complainant, under the contract set out in the bill, should not be remitted to a court of law for the recovery of his share of the profits stated in the contract.

We do not think the record bears out the claim made by defendant's counsel that the case made by the bill is not sustained by the evidence. Complainant's testimony

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states the contract made between him and the defendant substantially as it is stated in the bill. He testified, substantially, that defendant agreed with him that each should bear one-half of the expense of estimating the timber, and, if nothing came of it, each should bear his own loss, but, in case it should turn out to be a trade, defendant agreed to give him one-third of the profits realized, and to furnish all the moneys to make the purchase. This is substantially the contract as claimed by the bill.

The third contention of defendant's counsel is, as stated, that the agreement, as shown by complainant's testimony, was for an interest in lands, by which a trust was sought to be created in the lands in favor of complainant, and therefore it is within the statute of frauds, and cannot be enforced. The contract cannot have this construction. The case falls directly within the ruling of this Court in *Carr v. Leavitt, supra*, upon that point. It was there said:

"If the contract the plaintiff relied upon was within the statute, it must have been because it contemplated a purchase, and then a sale, of certain lands. But the plaintiff was to be neither purchaser nor seller, and the contract did not contemplate that in any contingency an interest in the land was to be conveyed to or vested in him. It contemplated only that in a certain event the plaintiff should receive a share of the moneys that a sale of the land should bring. His interest was therefore in these moneys, and not in the land itself. And the moneys were to be payable to him in consideration of services performed. The profits on the two trades, to be brought about by the plaintiff, were to be taken as the measure of compensation, instead of any other that might have been agreed upon. This surely was not a contract 'for the sale of any lands, or any interest in lands,' within the meaning of the statute of frauds."

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See, also, *Davis v. Gerber*, 69 Mich. 246, and cases there cited.

In the present case there is no claim upon the part of the complainant that he was ever to acquire any interest in these lands or properties. The title was to be taken in the name of the defendant, and the only interest which the complainant had or claimed to have was the profits arising from their sale. It is true that the lands which the Smith Lumber Company is now lumbering represent, in the hands of defendant, who holds the legal title, a portion of the profits arising from the contract between the parties; but, under the arrangement between them, these lands were to be lumbered, and the profits arising therefrom to be apportioned, one-third to the complainant. The defendant denies that complainant has any interest therein.

We think that the conclusion reached by the court below as to the rights of the parties, and the manner in which the complainant's share of profits was to be ascertained, does no injustice to either party.

The decree of the court below must therefore be affirmed, with costs.

The other Justices concurred.

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THE INTERNATIONAL FAIR & EXPOSITION ASSOCIATION OF DETROIT v. HIRAM WALKER.

[See 83 Mich. 386.]

Corporations—Action on subscription—Preliminary agreement—Waiver.

1. After the passage of Act No. 6, Laws of 1889, authorizing the incorporation of associations for exposition and exhibition purposes, the defendant became a subscriber to a preliminary subscription paper, by which the signers agreed to subscribe for and take stock to the amount set opposite their names in a corporation which the agreement stated they believed should be organized, with a capital stock of *at least* $250,000, for the purpose of purchasing suitable grounds and erecting suitable buildings thereon, upon a plan similar to the Buffalo Exposition. The subscriptions were not to be binding unless the sum of $100,000 was subscribed within 60 days from the date of the agreement, which condition had been complied with prior to the passage of said act. The association was organized after defendant had made his subscription, with a capital stock of $500,000, of which only $254,500 was subscribed. The articles of association were not signed by the defendant, nor did he subscribe for any of the capital stock except as before stated, but he attended a meeting called to select a site after such incorporation, and voted stock to the amount of his subscription. Grounds were purchased and buildings erected, and a fair held in the fall of 1889, and a dividend of five per cent upon the subscribed capital was declared. Assessments were duly made upon the subscribers to the subscription paper and to the articles of association for the full amount of their subscriptions, which assessments were based upon the amount actually subscribed, and not upon the entire capital of $500,000. The defendant was notified of the assessments, which he refused to pay, and after tendering him a certificate of stock for the amount of his subscription, and demanding its payment, which was refused, as also the acceptance of the certificate, a suit was brought, in which the plaintiff declared specially upon the agreement of the defendant to subscribe for and take $5,000 stock in the corporation, and averred its acceptance of said subscription, and that in reliance thereon it

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purchased the land and erected the buildings in accordance with the purpose of the corporation, and as a breach averred the neglect and refusal of the defendant to subscribe and take stock in the corporation, and pay any sum or sums thereon, according to the form and effect of his said agreement, to which declaration the common counts in *assumpsit* were added. On the first trial the defendant introduced no testimony, and a verdict was directed in his favor, and the decision of this Court reversing the judgment entered thereon is reported in 83 Mich. 386. A second trial has been had, and, in reversing the judgment entered upon a verdict directed in favor of the plaintiff, the majority of the Court (LONG and MORSE, JJ., dissenting, and adhering to the former opinion) hold:

a—That Act No. 6, Laws of 1889, does not authorize associations organized under it to proceed to the transaction of business until the entire capital stock is subscribed; neither does it authorize or provide for any preliminary subscription for stock, nor for any subsequent subscription to the capital stock.

b—That as a general rule, where the capital stock and the number of shares are fixed in the recorded certificate, no valid assessments or calls can be made on the subscriptions until the whole capital stock is taken, unless there be a provision to that effect in the certificate or in the general law under which the corporation is organized, and in such case the subscriptions may be considered to that extent conditional.

c—That the contention of the plaintiff, that it was the intent of the subscribers to the preliminary subscription paper that a corporation with a capital stock of $250,000 would contain sufficient capital for the purpose for which the corporation was to be formed, which sum was subscribed at the time of its organization, and that the subscribers were willing to be bound to pay their subscriptions if $100,000 was subscribed within the 60 days, although the whole capital stock was not subscribed, is untenable; that their agreement must be read in the light of what the act required should be done to legally organize the corporation; and that there is nothing upon the face of the agreement which would render the defendant liable to pay for his subscription unless the whole authorized capital was subscribed.

d—That, while the defendant was estopped by his conduct from denying that he was a stockholder and member of the corporation, he was not liable to be assessed upon his stock unless he had waived the condition that the whole capital stock must be subscribed before such assessment could be

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legally made; that the burden of proof was upon the plaintiff to establish such waiver, which would depend upon the knowledge which defendant had that the stock had not all been subscribed, and upon his acts and conduct tending to show that he was willing and desirous that the main purposes of the corporation should be proceeded with without such stock being subscribed, which facts were not conclusively established on the trial; and that the whole testimony tending to show such waiver should have been submitted to the jury.

2. The following propositions are summarized from the opinion of Chief Justice CHAMPLIN:

a—No one can legally exercise a franchise of a corporation unless authorized so to do by the Legislature.

b—All of the powers possessed and privileges enjoyed by corporations are conferred by their charters, or by the statute authorizing their formation under general laws.

c—When the statute points out a method of organizing a corporation under general laws, that method must be pursued by a substantial compliance with the statute, and none other can effect a legal incorporation.

d—In stock corporations organized for trade, manufacture, or other objects where it is expected that the investment of the capital stock will yield a return of profits by way of dividends or otherwise, the authorized capital stock is the life-blood of the corporation, and the means through which the object of organization is to be accomplished; hence said stock, and the shares into which it is divided, are required to be fixed by the articles of association.

e—Two classes of corporations are authorized under the Michigan statutes,—one on the basis of capital stock as a foundation for membership, in which each share represents a voting unit, and the other not upon a stock basis, but in which the membership is personal, and the individual represents the voting unit. The first class comprises all corporations organized for gain or profit upon the capital invested, and may be subdivided into two classes, the first of which is composed of all those corporations whose capital stock is required to be fixed in the articles of association, and the shares specified, and where the whole capital stock must be subscribed before they are fully organized and competent to do business.

f—Public policy, as well as the rights of individual members of the corporation, requires that the full amount of capital stock fixed in the law or articles of association should be subscribed when the corporation is formed, unless by special permission of the Legislature it may be afterwards subscribed.

g—Such capital stock is a trust fund for the protection of

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creditors and those dealing with the corporation, and, to be a fund at all, it must be subscribed; and, if fully paid in, public policy and the rights of stockholders require that such funds should not be diverted from the object to accomplish which the corporation was organized.

h—Such capital, though subscribed, need not all be paid in, but the amount to be assessed is usually left to the discretion of the board of directors, who may call in the capital in such installments as to them may seem best, and the statutes usually confer this authority.

i—It is this subscribed unpaid capital which the subscribers owe to the corporation that constitutes a trust fund in favor of creditors for the payment of the debts of the corporation; but, if the capital is not actually subscribed, there is no security to that extent for the creditors.

Error to Wayne. (Hosmer, J.) Argued May 13, 1891. Decided October 16, 1891.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

F. A. Baker (*William Aikman, Jr.*, of counsel), for appellant.

Marston, Cowles & Jerome, for plaintiff.

CHAMPLIN, C. J. At the first trial of this cause the defendant introduced no testimony, and the court below directed a verdict for the defendant. Upon the review of that record this Court reversed the judgment, and directed a new trial. 83 Mich. 386.

The case has been again tried substantially upon the same testimony upon the part of the plaintiff. The defendant introduced some testimony tending to show that when he subscribed it was represented to him that he should have an opportunity of inspecting the several sites offered before one was accepted, and also the part he took in the meeting held by the subscribers to the paper signed by him, pursuant to the call of the

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board of directors. He admits that when he subscribed he was told that the site afterwards adopted was one of the sites in contemplation, but he claims that he was not properly treated by the meeting of the 18th of March, because an adjournment to enable him to investigate other sites offered at that meeting was voted down. He admits that he voted not only the shares represented by his subscription, but also, as proxy, 150 shares which he had subscribed for his sons, and which subscriptions stood in their names. He admits that he requested that one of his sons should be made a director in the corporation to be formed, and that his wish was acceded to, and his son made a director. He admits that he voted against the site which the board of directors recommended as the most available for the purposes of the corporation. He denies that he took any other part thereafter in the proceedings of the corporation, and he denies that he assisted in the organization of the corporation, and testifies that the articles of association were never presented to him to sign, and that he did not sign the articles of association.

The declaration contains two special counts, based upon the agreement which he subscribed, which reads as follows:

"For the purpose of purchasing suitable grounds, erecting suitable buildings thereon, of a permanent character, for fair and exposition purposes, to be upon a plan similar to the Buffalo Exposition, and believing that a corporation with a capital stock of at least $250,000 should be organized for such purpose, the undersigned agree to subscribe for and take stock in such a corporation for such purposes to the amounts set opposite our respective names: *Provided*, that at least the sum of $100,000 shall be subscribed within sixty days from the date hereof, in order to render our agreement hereto binding.

"*Dated Detroit, January* 9, 1889."

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It appears from the original subscription paper introduced in evidence, containing the signatures of the subscribers and the amount subscribed by each, that at the time the defendant signed the subscription there had been already subscribed the sum of $207,000, and thereafter the further sum of $27,500 was subscribed, which latter subscriptions were upon a separate sheet, and under the date of February 9, 1889. At the time some of these subscriptions were made, no act had been passed by the Legislature authorizing the formation of corporations for the purpose of constructing, owning, controlling, and acquiring by lease buildings for exposition or exhibition purposes, but such act was passed by the Legislature and approved February 13, 1889, and ordered to take immediate effect; and it further appears from the testimony that this subscription was made after the act of incorporation had passed, but before any association had been formed under the authority of such act.

It further appears from the testimony that on the 25th day of February, 1889, a notice was mailed to each of the subscribers of the paper above set forth, as follows:

"A meeting of the subscribers to the Exposition Association will be held at the office of Judge Marston, new Whitney block, Tuesday, February 26, 1889, at 2 o'clock, for the purpose of organizing. Your presence is requested

"E. W. COTTRELL,
"GEORGE M. SAVAGE,
"BRUCE GOODFELLOW,
"Committee."

There was no testimony introduced showing that the defendant received this notice, but it appears from the testimony of Mr. Cottrell that he personally notified the defendant of this meeting at his office a day or two previous to the time of meeting, at which time Mr. Walker said he did not know whether he would be there or not; that he would try to come, and, if he did not

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come, he would like to have one of his sons on the board. The meeting was held pursuant to the notice, and articles of association were presented, discussed, and adopted, and subscribed by a number of those present representing $100,000 of the stock, and such articles were recorded in the office of the Secretary of State on the 12th day of March, 1889. They were also subscribed by E. Chandler Walker, a son of the defendant, to the amount of $5,000, and he was named as one of the directors in the articles of association. The board of directors named in the articles of association proceeded to organize as a board, and elected the officers required by the articles. They afterwards issued and mailed to the subscribers the following notice:

"DETROIT, MARCH 9, 1889.

"*Dear Sir:* Subscribers to the Detroit International Fair and Exposition Association are requested to meet with the board of directors at Library Hall, Merrill block, on Monday, the 11th inst., at 8 o'clock P. M., for the purpose of determining upon a location.

"D. M. FERRY, Pres't.
"E. W. COTTRELL, Sec'y."

At the time mentioned a meeting was held, to which meeting the directors made a report with reference to the locations which had been brought to their attention, and in which they favored the location known as the "Field Farm," belonging to Mr. McMillan. After discussing the merits of the different locations, an adjournment was had for one week, to enable the subscribers to investigate the merits of the respective locations presented, which meeting was held on the 18th day of March, 1889. The defendant did not attend the first meeting, but did attend the adjourned meeting. At this meeting one or two new sites were offered, and he moved an adjournment of the meeting for the purpose of examining the new sites. This was put to a vote upon a

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stock basis, and he voted the stock which he had subscribed, and also the stock represented by his sons, in all 200 shares. The proposition to adjourn was defeated. A motion was made to determine the preference of the stockholders for a site. There were 1,580 shares voted, of which 1,155 were in favor of what was termed the "Field Farm" site, and 425 against the proposal; the defendant, Walker, voting against the Field site. The meeting was then adjourned. The record of the meeting, as kept by its secretary, states that the 425 shares above mentioned were voted for what was known as the "Bressler Site," but defendant, Walker, testifies that he did not vote for the Bressler site, but voted against the Field site.

It appears further from the testimony that the board of directors soon thereafter proceeded to purchase the site from Mr. McMillan, and entered into a contract with him by which they agreed to pay for such site $2,000 an acre. The number of acres contained in the site was 69.96. They also entered into contracts for the construction of buildings and other improvements, and made assessments on the stock, not only upon those who had subscribed the articles, but upon the subscribers of the paper heretofore mentioned, from time to time, until they had called for the whole amount so subscribed. The total amount paid in upon subscriptions, up to the time of commencement of suit, was $236,000, for which certificates of stock were issued. The defendant was notified of these calls upon his subscription to the stock, but he neglected and refused to pay. Before suit was brought the corporation tendered him a certificate of stock for $5,000, and demanded payment thereof, but he refused to accept the certificate, and also refused payment.

The articles of association provided that the whole capital stock of the corporation should consist of $500,000,

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and the number of shares 5,000. It is not shown clearly by the record that any subscriptions were made subsequent to the organization of the company, and it is a conceded fact that the whole amount of capital of $500,000 has not been subscribed for. It also appears that the assessments upon the subscriptions were based upon the amounts actually subscribed, and not upon the basis of the entire capital of $500,000. It further appears that the whole amount of the capital stock paid in has been invested in the lands and improvements, and that it still owes Mr. McMillan for the land upon the contract in the neighborhood of $110,000.

The corporation held a fair and exposition upon the site purchased by it in the fall of 1889, which appears to have been successful, and it declared a dividend of 5 per cent. upon the subscribed capital. In the following year, 1890, it held another exposition, and netted something like $30,000, which amount it expended in improvements upon the property. One of plaintiff's witnesses testified that the total indebtedness of the company at the time of the trial was about $140,000,—from $130,000 to $140,000; that the capital stock had been expended in making payments on the land contract, and in making permanent improvements upon the property. He also testified that the stock of the corporation he should think was worth 100 cents on the dollar.

As before stated, the special counts of the declaration are based upon the agreement which Mr. Walker signed, to subscribe for and take $5,000 stock in the corporation, and aver that the corporation accepted the subscription of the defendant set forth in said agreement, and in reliance thereupon proceeded to purchase the land and erect the buildings in accordance with the purpose of the corporation. Both counts allege as a breach that the defendant has wholly neglected and refused to subscribe

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and take stock in said plaintiff corporation, and to pay any sum or sums thereon, according to the form and effect of said agreement, to the damage of the plaintiff $10,000. The declaration also contains the common counts in *assumpsit*. It will therefore be necessary to consider, under the special counts, the liability of the defendant to the plaintiff corporation, not as a stockholder, but for the breach of his agreement to subscribe for and take the stock in the corporation, and under the common counts it will be necessary, if the testimony shall warrant it, to determine his liability as a stockholder of the corporation; and in both cases the damages which the plaintiff is entitled to recover form an important consideration.

In order to determine the liability of the defendant under these different claims of the declaration, it will be necessary to advert to the rights and liabilities of members of a corporation, as between the corporation and the members, and also as between persons who enter into a voluntary agreement to subscribe for and take stock in a corporation to be thereafter formed.

No one can legally exercise a franchise of a corporation unless authorized so to do by the Legislature. All the powers they possess and all the privileges they enjoy are conferred by their charters, or the statute authorizing the formation of corporations under general laws. When the statute points out a method of organizing a corporation under general laws, that method must be pursued by a substantial compliance with the statute, and none other can effect a legal incorporation. In stock corporations organized for trade, manufacture, or other objects where it is expected that the investment of the capital stock will yield a return of profits by way of dividends or otherwise, the capital stock authorized is the life-blood of the corporation. It is the means through which the object of organization is to be accomplished. Hence it

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is always the case that the capital stock of such corporations, and the shares into which it is divided, are required to be fixed by the articles of association. There appear to be two classes of corporations authorized by the laws of this State:

1. Those organized on the basis of capital stock as a foundation for membership, in which each share represents a voting unit.
2. Those organized not upon the stock basis, where the membership is personal, and the individual represents the voting unit.

The first class comprises all corporations organized for gain or profit upon the capital invested, and may be subdivided into two classes, the first of which comprises all those corporations where the law requires the capital stock to be fixed in the articles of association and the shares specified, and where the whole capital stock must be subscribed before they are fully organized and competent to do business. Of this class the plaintiff corporation is a type.

The statute (Act No. 6, Laws of 1889, 3 How. Stat. chap. 120*c*) authorizing the formation of this corporation in its second section reads as follows:

"SEC. 2. Such persons shall, under their hands and seals, make and subscribe articles of association, which shall be duly acknowledged, and shall state:

"*First.* The name of such corporation.

"*Second.* Distinctly the purpose for which the corporation is formed.

"*Third.* The amount of capital stock, and the number of shares thereof.

"*Fourth.* The names of the stockholders, their respective residences, and the number of shares held by each.

"*Fifth.* The place in this State where the office for the transaction of business shall be located.

"*Sixth.* The term of its existence, which shall not exceed thirty years.

"*Seventh.* The number of directors, which shall not be

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less than five nor more than nine, and the names of those who shall be directors for the first year."

Section 3 provides:

"Before commencing business, the directors shall cause said articles to be recorded in the office of the Secretary of State, who, upon recording the same, shall indorse the date and place of such record thereon, and return the said articles, with such indorsement thereon, to said directors, who shall thereupon cause the same to be recorded in the office of the county clerk of the county where such office is to be located."

Section 5 enacts:

"The directors may call in subscriptions to the capital stock of such corporation by installments, in such portion and sums, and at such times and places, as they shall think proper, by giving notice thereof as the by-laws shall prescribe; and in case any stockholder shall neglect or refuse payment of any such installment for the space of thirty days after the same shall have become due and payable, and after he shall have been notified in writing by the secretary thereof, the stock of such delinquent stockholder may be sold by the directors at public auction at the office of the secretary of the corporation, giving at least thirty days' notice, in some newspaper published in the county in which its office is located, of the time and place of such sale, and the proceeds of such sale shall be first applied in payment of the installment called for and the expense of such sale, and the residue, if any, shall be refunded to the owner thereof; and such sale shall entitle the purchaser to all the rights of a stockholder to the extent of the shares so bought: *Provided*, that in case the proceeds of such sale shall not equal the amount due upon such stock and the expenses of such sale, then and in that case the corporation may sue for and recover such balance from such delinquent stockholder in an action of *assumpsit* in any court having cognizance of the action."

Section 10 declares:

"The stock of such corporation shall be deemed personal property, and shall be transferred only on the books of the company in such manner as the by-laws of

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such corporation shall prescribe; and such corporation shall at all times have a lien upon the stock or property of its members invested therein for all debts due from them to such corporation, which may be enforced by advertisement and sale in the manner herein provided for selling delinquent stock, and all purchasers at such sales shall be entitled to the rights of stockholders."

There is nothing in this act which authorizes the corporation to proceed to do business before the whole capital stock is subscribed. Neither does it authorize or provide for any preliminary subscription for stock, nor any subsequent subscription to its capital stock. In this it is quite different from the other class of stock corporations, where, in exceptional cases, the Legislature has expressly authorized the corporation to proceed to do business before all the capital stock is subscribed. Of this class railroad and mining corporations are types. Under the general railroad laws, the corporation is authorized to do business when a certain sum per mile of the road has been in good faith subscribed, and five per cent. of the amout thereof paid in to the directors named in the articles of association. The affidavit of that fact, made by any two of said directors, is attached to the articles of association. Such articles may be filed in the office of the Secretary of State:—

"And thereupon the persons who have subscribed such articles, and all other persons who shall from time to time thereafter subscribe to or become the holders of the capital stock of said corporation, in the manner to be provided in its by-laws, shall be a body corporate," etc. How. Stat. § 3313.

Section 3315 enacts:

"The board of directors are hereby authorized and required to provide by by-laws for the disposition of its unsubscribed capital stock, and may provide for the election or appointment of agents or employés of said company, and may require of them security for the faithful

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performance of their duties, and for the general management of the business and affairs of said company."

The statute authorizing the formation of corporations for mining, smelting, and manufacturing iron, etc., contains the same requirements in order to form the corporation as are contained in the act under which the plaintiff is organized; but section 3 of the act (How. Stat. § 4078) provides as follows:

"It shall not be necessary for the original corporators to subscribe for the entire capital stock, but the portion not subscribed for may be disposed of at any time afterwards by the corporation in such manner as the by-laws of the corporation may prescribe."

Under the general railroad law as it now exists, it has been held by this Court that a subscriber to the stock of a railroad company, when sued on his subscription, may prove in defense the failure of the corporation to secure the requisite amount of subscriptions; and that, unless it has secured the amount per mile required by the statute, a subscriber is not liable to assessments upon his stock. *Monroe v. Railroad Co.*, 28 Mich. 272; *Swartwout v. Railroad Co.*, 24 Id. 389.

Public policy, as well as the rights of individual members of the corporation, requires that the full amount of capital fixed in the law or articles of association should be subscribed when the corporation is formed, unless by special permission of the Legislature it may be afterwards subscribed. The capital stock of the corporation is a trust fund for the protection of creditors and those dealing with the corporation. To be a fund at all, it must be subscribed, and, if fully paid in, public policy and the rights of stockholders require that such funds should not be diverted from the object to accomplish which the corporation was organized. The capital, though subscribed, need not all be paid in, but the

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amount to be assessed is usually left to the discretion of the board of directors, who may call in the capital in such installments as to them may seem best, and the statutes usually confer this authority. It is this subscribed unpaid capital which the subscribers owe to the corporation that constitutes a trust fund in favor of creditors for the payment of the debts of the corporation; but, if this capital is not actually subscribed, there is no security to that extent for the creditors. A corporation without subscribed capital would be a mere bubble, without responsibility, and liable to do great mischief in the mercantile world, putting forth false bases of credit, and preying upon the community by reason of such deception.

The rights of every subscriber to the stock depend upon the full amount being subscribed. These enterprises are entered into for the purpose of gain and profit. It is essential to the member that his rights and liabilities as a member should be fixed when he enters into the engagement by his subscription. The capital which is named in the articles of association and the shares specified are known to him when he subscribes, and by this he knows that his subscription comprises an aliquot part of the entire capital of the corporation; that when calls are made they are based upon the whole capital authorized; and that he cannot be called upon to pay more than his share for the purpose required, which would be the case if calls could be made before the whole amount of the capital is subscribed. Such capital is usually fixed at such a sum as the subscribers consider necessary, or that will be required, to secure the object for which the corporation is formed; and it might, and probably would, be disastrous to the enterprise to embark in the undertaking before the whole capital was secured by actual subscriptions. *Railroad Co. v. Johnson*, 30 N. H. 390,

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407; *Railroad Co. v. Barker*, 32 Id. 363; *Manufacturing Co. v. Parker*, 14 Id. 543; *Insurance Co. v. Hart*, 31 Md. 60; *Hughes v. Manufacturing Co.*, 34 Id. 332; *Railroad Co. v. Cushing*, 45 Me. 524; *Railroad Co. v. Clarke*, 61 Id. 384; *Railroad Co. v. Preston*, 35 Iowa, 118; *Livesey v. Hotel Co.*, 5 Neb. 50; *Bridge Co. v. Cummings*, 3 Kan. 69; *Railroad Co. v. Hunt*, 39 Conn. 75; *Wontner v. Shairp*, 4 C. B. 404; *Navigation Co. v. Theobald*, 1 Moody & M. 151; *Fox v. Clifton*, 6 Bing. 776; *Railway Co. v. Dalbiac*, 6 Eng. Ry. Cas. 753; *Railroad Co. v. Veazie*, 39 Me. 571; *Fry v. Railroad Co.*, 2 Metc. (Ky.) 323; *Railroad Co. v. Gould*, 2 Gray, 277. In the case last cited Chief Justice Shaw says:

"It is a rule of law, too well settled to be now questioned, that when the capital stock and the number of shares are fixed by the act of incorporation, or by any vote or by-law passed conformably to the act of incorporation, no assessment can be lawfully made on the share of any subscriber until the whole number of shares has been taken;" citing Massachusetts cases.

And he further says:

"This is no arbitrary rule; it is founded on a plain dictate of justice, and the strict principles regulating the obligation of contracts. When a man subscribes a share to a stock, to consist of one thousand shares, in order to carry on some designated enterprise, he binds himself to pay a thousandth part of the cost of such enterprise. If only five hundred are subscribed for, and he can have no assurance which he is bound to accept that the remainder will be taken, he would be held, if liable to assessment, to pay a five-hundredth part of the cost of the enterprise, besides incurring the risk of an entire failure of the enterprise itself, and the loss of the amount advanced towards it." And see cases cited by the court in that case.

The question has long since been settled in this Court in accordance with the above authorities. The point was raised and expressly decided in *Shurtz v. Railroad Co.*, 9

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Mich. 269. The railroad law of 1855, although permitting an organization and election of directors before the whole capital stock was subscribed, did not authorize the corporation to proceed with the main design of the corporation until all the stock was subscribed. This statute has been since amended so as to permit the corporation to proceed whenever a certain amount of stock per mile has been in good faith subscribed. The defendant in that case had signed the following subscription:

"We, the undersigned, agree to take the number of shares of stock in the Schoolcraft & Three Rivers Railroad Company which is set opposite our names, respectively, and bind ourselves, our heirs and executors, to pay for the same in monthly installments, to the order of the president and directors of said railroad company, or their agent or attorney, for the purpose of constructing or building said road, whenever called upon so to do, which installments shall not exceed twenty per cent. at any one time; to be paid in one year."

The subscription was made upon a subscription paper circulated by an agent appointed by the board of directors. No books of subscription were opened. The whole amount of stock was never subscribed. The directors called assessments from time to time up to the full amount of each share subscribed. Defendant never paid any portion of his subscription, but on several occasions promised to do so. The suit was brought upon the subscription to the stock above set forth. Mr. Justice CAMPBELL, speaking for the Court, said:

"The principal legal questions arising on this finding relate to the validity of the subscription, and the right to levy assessments upon it, if valid, before all the stock was subscribed."

The learned judge reviewed the general railroad law and the validity of the subscription made in that case and held that, inasmuch as it was not made pursuant to the statute, it was no consideration for the promise made

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by the defendant, Shurtz. Upon the other question, namely, the right to levy assessments, he said:

"We are also of opinion that, had the case found a legal subscription, any levy of assessments was premature. The case finds expressly that all of the stock was not subscribed. How far the act of 1857 modifies the power to call in subscriptions till this is done is immaterial in this case, as all that was done here preceded the passage of that act. It is quite common in our special charters, and in some of our general laws, to permit corporations to proceed in the exercise of all their powers before their stock is all taken. When this is allowed there is usually an express limitation, unless it is fairly to be deduced from other plain provisions. But the general railroad law (at least as it existed before the amendment referred to) contains no provision from which such an intent can be deduced. It allows each company to fix its own stock, but it must not fall short of $4,000 per mile for flat rail, or $8,000 per mile for heavy rail. When we compare this provision with the requirement that the commissioners shall keep their books open until all the subscriptions are full, and then call a meeting to elect directors, at which they are to act as inspectors, we cannot resist the inference that the act was designed to prevent any company from proceeding without an assurance of genuine capital adequate to insure the building of the road entirely, or far enough to make it a safe security for loans to finish it. Persons subscribing have a right to rely on the completion of the stock subscriptions, as some assurance that their means will not be absolutely thrown away. And it is fairly presumable that broad grounds of public policy, to prevent gambling in inflated securities, and obtaining money under false appearances, were not left out of sight by the Legislature. Several cases were cited on the hearing which held that the subscribers could not lawfully be called on to pay any assessments until either the whole stock or such minimum as the corporate law prescribed should be taken. The reasons given for this rule are convincing, and ought to prevail."

Here was a case of a voluntary subscription, containing an express promise to subscribe and pay for the stock within one year, and the subscriber attended a stockhold-

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ers' meeting and voted; and yet this Court held that the subscription was not valid, but, if it was, no recovery could be had until the whole amount of the capital stock had been subscribed. This case was approved upon the first point, upon the question of its validity, in *Carlisle v. Railroad Co.*, 27 Mich. 319.

A pertinent inquiry here is, could the corporation organized under the articles of association set forth in the record be compelled to recognize Walker as a stockholder, or to treat his subscription as valid? In the case last above cited the statute declared that—

"The persons who have subscribed such articles, and all other persons who shall from time to time thereafter subscribe to or become the holders of the capital stock of said corporation, in the manner to be provided by its by-laws, shall be a body corporate."

No by-laws were adopted, and at no formal meeting of the directors were the terms of subscription agreed on; but the commissioners, without holding a formal meeting, agreed upon the form, which defendant subscribed, in which he thereby agreed to subscribe and take the shares, and pay for them as the board of directors might direct and require. The Court said:

"No person can obtain rights of membership in a corporation except in compliance with its charter or governing law, and, if that prescribes any conditions or special methods of becoming a member, the law is imperative. There may be cases of mutual dealing which will estop both parties, but no contract or subscription can be valid if not conforming to the statute. * * * An offer may perhaps be made subject to future acceptance, where the charter does not require the subscription to be made otherwise. But where the manner of subscribing is laid down, it is difficult to find room for any other."

And after citing the case of Shurtz, and also *Howard's Case*, reported in the Law Reports (1 Ch. App. 561), the Court say:

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"The Legislature having seen fit, for satisfactory reasons, to declare that the members of the corporation should consist of the original subscribers, and of such other persons as should subscribe or become holders 'in the manner to be provided by its by-laws,' it must follow that, until by-laws should be enacted, there could be no further subscriptions."

In this case the Legislature has seen fit, for satisfactory reasons, to declare that the members of the corporation should consist of the original subscribers, and gives no authority and provides no means for any other persons becoming subscribers to the stock; the intention being that the whole amount should be taken at the time of organization. See *Parker v. Railroad Co.*, 33 Mich. 23; *Northern Cent. Mich. R. R. Co. v. Eslow*, 40 Id. 222. And in *Swartwout v. Railroad Co.*, 24 Mich. 389, this Court again held the doctrine that the whole amount of the capital per mile required by law for that designated portion of the road, must be subscribed before the subscriber to the stock is liable to assessment. I shall revert to this case and to the case of Carlisle further on, upon another point presented by this record.

In the case at bar, as has been before observed, a number of persons signed the articles of association, to the amount of 1,000 shares, and proceeded to name their officers, and file and record their articles, and act as a corporation, without having the full amount of the capital stock named in the articles subscribed; and the question arises whether they are competent to maintain an action against the defendant for not taking and subscribing for the stock according to his agreement. They attempted to organize under the statute, they failed alone in the particular referred to, and the question is whether the defendant can raise the objection against their maintaining this action against him because of this defect in their

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organization. A similar question came under review in the case of *Swartwout v. Railroad Co.*, 24 Mich. 389. In that case there was a *bona fide* attempt to incorporate, but the provisions of law had not been complied with, and Swartwout had subscribed the stock, and had paid 35 per cent. of his subscription to the corporation, and had acted as a stockholder. The Court said:

"Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence; where it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be, and the questions suggested are only whether there has been exact regularity and strict compliance with the provisions of the law relating to incorporation,—it is plainly a dictate, alike of justice and of public policy, that, in controversies between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, such questions should not be suffered to be raised."

See, also, *Carlisle v. Railroad Co.*, 27 Mich. 315; *Jhons v. People*, 25 Id. 499; *Monroe v. Railroad Co.*, 28 Id. 272; *Whipple v. Parker*, 29 Id. 379; *Merchants', etc., Bank v. Stone*, 38 Id. 782; *Wilcox v. Railroad Co.*, 43 Id. 590.

In *Monroe v. Railroad Co.*, 28 Mich. 275, it is pointed out that a distinction exists between that case and that of Swartwout. There is a wide difference between the existence of the company as a corporate body and the liability of the parties for their subscriptions to the capital stock. As a general rule, where the capital stock and the number of shares are fixed in the recorded certificate, no valid assessments or calls can be made on the subscription until the whole capital is taken, unless there be a provision to that effect, either in the recorded certificate or general law under which the company is incorporated, and in such case the sub-

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scription may be considered to that extent conditional. See *Swartwout v. Railroad Co.*, 24 Mich. 396, 397; *Monroe v. Railroad Co.*, 28 Id. 275, 276.

It is proper, therefore, to consider in this case, first, whether there is anything in the contract itself which may be regarded as a waiver of this essential. It is claimed, first, that it was the intent of the subscribers that a corporation, with a capital stock of $250,000 subscribed, would contain sufficient capital for the purpose for which the corporation was to be formed, and that in this case more than that amount was subscribed at the time of its organization,—the whole amount, as before stated, shown by the subscription papers, being $254,500; and, further, that the subscribers were willing to be bound to pay the subscriptions if $100,000 should be subscribed within 60 days from the 9th day of January, 1889, which was done. It will be noticed that the agreement did not limit the capital stock to be subscribed at $250,000, but provided that at least the capital subscribed should be that amount. It was, therefore, no breach of the contract that the capital named in the articles of association was $500,000 instead of $250,000. But I can see nothing in the contract which expresses an intent that the subscribers shall be bound to pay their subscriptions unless the whole capital, whatever it might be, shall be subscribed for. The intent appearing upon the face of the contract is that a corporation should be formed embracing a capital stock not less than $250,000, and that at least $100,000 of the capital stock should be subscribed for within 60 days from the date of the paper. There is nothing in this which implies that it was the intent of the subscribers to be bound to pay assessments if $100,000 should be subscribed, although the whole capital stock was not subscribed. The agreement must be read in the light of what the law required should be

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done to legally organize the corporation,—that is, that it should have a fixed capital, and the whole authorized capital should be subscribed in the articles. Therefore I see nothing upon the face of the contract which would render the defendant liable to pay for his subscription unless the whole authorized capital was subscribed, in which case the corporation could allot no part of it to him. This becomes pertinent under the special counts, upon the question of damages, for it would be unjust to hold the defendant to a greater liability under his voluntary subscription than he could be held to had he subscribed the articles of association. He is not by reason of such subscription a member, and recovery against him for breach of the agreement will not make him such. Here is the inherent difficulty under the special counts of the declaration. This law authorizes no unsubscribed capital, and places none at the disposal of the corporation to allot to those who have agreed to subscribe before the organization, but have refused to do so. If the capital stock can ever be filled to the full amount fixed in the articles, it must be done by a new agreement between the corporation as one in fact, and those who engage with it knowing the facts, and intending to subscribe for the unsubscribed capital.

This difficulty does not arise in those corporations where the law does not require the whole capital to be subscribed in the first instance, but allows it to be done from time to time, and authorizes the directors to dispose of the unsubscribed capital; and persons entering into an agreement to subscribe for and take shares in such a corporation can compel the corporation to allot shares to them, and it is in a position to carry out its contract, because it has the shares at its disposal; but even in that case, if the shares had all been taken and allotted, a subscription for further shares could not be

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enforced. And this distinguishes the present case from *Peninsular Ry. Co. v. Duncan*, 28 Mich. 130. That case holds and proceeds entirely upon the theory that the statute authorized a preliminary subscription, and it authorized such preliminary subscribers to organize by complying with certain specified conditions; and Mr. Justice COOLEY, at page 134, says:

"By any such voluntary subscription to take stock, however, we should naturally understand some mutual agreement by which the promoters severally agree to take and pay for certain shares in the proposed corporation; something, in short, like or similar to the agreement which was actually entered into in the present case. We do not understand that there would be any difficulty at the common law in enforcing the promises contained in an agreement of this general nature against the several promisors, where the object to be accomplished was lawful, where a beneficial purpose was in view, and where it was possible to make to the several promisors the return which their subscriptions called for. In such cases the promises are mutual; acts are done and moneys expended in reliance upon the subscriptions; and the moment the promises are accepted by the organization and action of the corporation to which they are provisionally made, there can generally be no difficulty in their enforcement, if the corporation then has it in its power to give the stock subscribed for, and offers to do so. In such a subscription, thus accepted, there would be all the requisites of a valid contract,—proper parties, and a promise made upon a legal and valuable consideration."

Under the general railroad law, it is possible to make to the several promisors the return which their subscriptions called for. The whole amount of capital stock is not required to be subscribed as a condition precedent to organization, and the directors are allowed to prescribe how unsubscribed stock shall be taken. The corporation is in a position to allot the stock to the subscribers. But the learned justices do not choose to place the liability in that case upon the common-law grounds, but

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deduce it from the language of the statute, and hold that the language applies to those who subscribed before the organization as well as to those who did so afterwards; that by force of the statute the subscribers were entitled to the stock if the whole amount of capital had not been subscribed, and the commissioners could only apportion the excess if more than the authorized capital was subscribed. But they further held that the subscription, even then, was ineffectual, unless 5 per cent. had been paid in upon it by the subscriber or some one for him. Without this payment he would not be entitled to participate in the organization of the corporation. He would not be one of the associates, in such a case. Page 143.

I am content to approve of the decision upon the grounds upon which Mr. Justice COOLEY places it, and I agreed in the opinion rendered in this case, and reported in 83 Mich. 386, in reliance upon that case. But I am frank to admit that I failed to distinguish the law which governs corporations under which that decision was made from the law under which this corporation was formed. The mutuality spoken of in such cases is not the mutuality existing between the subscribers with each other, but between the subscribers and the corporation. Had it been an absolute agreement to pay for the stock subscribed in the manner it was, before an organization, it would not have constituted defendant a stockholder, because there was no law authorizing such preliminary subscription; and I am at a loss to know how he can be made liable for failing to perform a promise which, had it been performed, would have been of no binding force.

But, if he could be liable at all for the failure to subscribe and take stock, what damages could be recovered? Is he liable for the par or face value of $5,000 stock in the corporation? If so, it must be that the plaintiff was

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the owner of such stock, and had a lawful right to sell and deliver to defendant. It is stated in the record that the certificate was tendered to defendant, which he refused. Nothing in the pleadings or record shows that such tender has been kept good. The title did not pass to defendant. He not only refused the stock certificate, but he refused to subscribe. The corporation may, if it has a legal right to dispose of its unsubscribed capital, permit it to be subscribed for and to issue it to any other person. In other words, it holds the title to the property, and is possessed of all the value it contains. It cannot recover in this action the value, and retain the stock. It is laid down in Morawetz on Private Corporations, and also in *Thrasher v. Railroad Co.*, 25 Ill. 393, that, under an agreement to subscribe for a certain amount of stock, the measure of damages is the difference between the par value of the stock agreed to be subscribed for and the market value of such stock. This ought to be the rule where the corporation has unsubscribed capital which it is authorized to dispose of; but the testimony shows that, if such rule is applicable to this case, the plaintiff has suffered no damage for defendant's failure to subscribe, because the plaintiff's witness testified that this stock is worth 100 cents on the dollar, and this is the only testimony as to the value.

The next question to be considered is whether the defendant is liable in *indebitatus assumpsit*. If he is so, it must be upon the ground of estoppel; that by his conduct and actions he has assumed the relation of a stockholder in the corporation, and has been recognized by the corporation as a member. The testimony upon which this claim of estoppel is based has been mentioned. It was said in *Fredenburg v. Church*, 37 Mich. 478:

"Estoppels never arise from ambiguous facts; they

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must be established by those which are unequivocal, and not susceptible of two constructions."

The effect of this conduct may be considered with reference—

1. As to an admission that defendant was a stockholder and member of the corporation.
2. As to the liability of defendant to be assessed before all the stock was subscribed.

There is no dispute npon the testimony in this record that defendant attended what was considered as a meeting of the subscribers to the capital stock, which included those who had joined in the organization, and others like him, who had agreed to subscribe for and take stock in the corporation. He acted, to all intents and purposes, as a stockholder upon the occasion, and for the purpose of considering a corporate act. I think there can be no question but that the corporation recognized him as a stockholder and member, and that he recognized that relation himself. The estoppel, so far as membership is concerned, is mutual and binding upon both parties.

But whether he was liable to assessments depends upon other considerations. He was not liable to be assessed upon his stock, unless he has waived the condition upon which such assessments in a corporation like this are based, and that is that the whole capital stock must first be subscribed. See Michigan authorities before referred to. Did he intend by what he did to waive that condition? The burden of proof is upon the plaintiff to show waiver. The plaintiff must show that the defendant had knowledge of the facts from which the intention can be inferred to waive a right given him by law. Waiver is voluntary, and implies an election to dispense with something of value, or forego some advantage which he might, at his option, demand or insist upon. *Hahn v.*

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Miller, 60 Iowa, 96 (14 N. W. Rep. 119); *Warren v. Crane*, 50 Mich. 300; *Waldron v. Murphy*, 40 Id. 668. The question of waiver is one of intent, and is a proper subject of inference from surrounding circumstances, and it may be proved by circumstances as well as by direct testimony. *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241; *Cobbs v. Association*, 68 Id. 465. And where it is claimed to be established by conduct and circumstances from which different minds might draw different conclusions, the question whether waiver is made out or not is one for the jury. *Hale Manfg. Co. v. American Saw Co.*, 43 Mich. 250; *Chapman v. Colby*, 47 Id. 46; *Cobbs v. Association*, 68 Id. 465.

Whether the defendant intended to waive the requirement that all of the stock should be subscribed before he should be called upon to pay would depend upon the knowledge which he had that it had not all been subscribed, and, further, upon the acts and conduct of defendant tending to show that he was willing and desirous that the main purposes of the corporation should be proceeded with without such stock being subscribed. The record before us upon this trial does not establish conclusively these facts, and the whole testimony tending to show waiver should have been submitted to the jury.

We are also asked to review our decision upon the question as to whether or not there could be a personal liability against a subscriber in this corporation for the stock subscribed by him, the defendant insisting that the remedy pointed out in the statute before quoted is exclusive, and that no action would lie to recover upon subscriptions for stock until after it had been sold for a failure in payment, and then only for the deficiency. Upon this point I am satisfied that our decision in the case when here before was correct.

For the error committed in not submitting the testi-

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mony tending to show a waiver to the jury, I think the judgment should be reversed, and a new trial granted.

McGRATH and GRANT, JJ., concurred with CHAMPLIN, C. J.

LONG, J. *(dissenting).* This case was before this Court at the October term, 1890, and is found reported in 83 Mich. 386.

Upon the former trial defendant had verdict and judgment by direction of the court. The judgment was reversed by this Court, and a new trial ordered. The case has again been tried in the Wayne circuit court, where the plaintiff had verdict and judgment by direction of the court. The facts are fully stated in the former opinion, and no new or additional facts are now presented by this record.

We can only reiterate what was said in the former opinion, that the action is not brought to recover against a stockholder as such, but upon the agreement to pay the sum of $5,000 to the use of the corporation thereafter to be organized, and for the purposes named in the contract.

Counsel for defendant present their brief, which, in effect, is a reargument of the questions raised and decided upon the former hearing, and we do not feel called upon to repeat or reargue the questions which were there decided. We must adhere to our former opinion.

The judgment should be affirmed.

MORSE, J., concurred with LONG, J.

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HENRIETTA HOWE v. LEVI HYDE.

88	91
122	569
88	91
s50NW	102
132	s527

Parent and child—Contract for support of mother—Consideration—Charge to jury—Parties—Husband and wife—Assignment of claim.

1. In a suit by a daughter to recover from her uncle for the care and board of her mother, the court instructed the jury that they must find that the defendant received a valuable consideration from the plaintiff, which induced him to make the contract relied upon, as a naked promise was void on general principles of law. The court also instructed the jury that if they should find that the defendant was desirous of aiding in the support of his sister, and agreed with the plaintiff to pay her the charges and expenses of such support above the pension she was receiving, the plaintiff could recover what such support was reasonably worth. Error is assigned upon the first portion of the charge. And it is held that the second instruction, taken in connection with the first, sufficiently explained what would be a consideration for the promise of the defendant.
2. It was not error for the court to instruct the jury that the plaintiff was legally bound to maintain and care for her mother at her own expense, under the statutes of the State, if able to do so, and that the defendant was not liable to pay for his sister's support and maintenance.
3. A married woman brought suit in her own name for the support of her mother. Her husband testified that the promise of the defendant to pay for such support was made to him personally, and afterwards testified that it was made to himself and wife jointly, in which latter statement he was corroborated by his wife. The husband further testified that he was willing that his wife should bring the suit in her own name. The court instructed the jury that, if they should find that the promise was made to plaintiff and her husband jointly, she could not recover in her own name; which instruction is sustained, the statement of the husband as to his wife bringing the suit in her own name not being an assignment, nor an equivalent to an assignment, of his interest in the claim sued for.

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Error to Shiawassee. (Newton, J.) Submitted on briefs October 6, 1891. Decided October 30, 1891.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

A. R. McBride, for appellant, contended as stated in the opinion, citing no authorities.

John T. McCurdy, for defendant.

CHAMPLIN, C. J. The plaintiff brought this action to recover for board, clothing, and caring for Eunice Nearing, the defendant's sister, from May 17, 1884, to August 26, 1889, at five dollars a week, and also doctors' bills and funeral expenses incurred on account of said Eunice Nearing. Eunice Nearing was a sister of the defendant, and the mother of the plaintiff. The cause was tried in the Shiawassee circuit before a jury, and a verdict was rendered in favor of the defendant.

Several objections were taken during the course of the trial to the introduction and exclusion of testimony, and errors assigned thereon, which are now waived in the brief of the counsel for the plaintiff, and the only error relied upon is the charge of the court to the jury. In giving his instructions to the jury the learned circuit judge said:

"The jury must find from the evidence in the case that the defendant received a valuable consideration from the plaintiff, which induced him to make the contract relied upon in this case, as a naked promise is void on general principles of law."

Error is assigned upon this instruction. In ascertaining whether error has been committed in the charge of the court it is necessary and proper that the whole charge should be taken together; and, after this state-

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ment of an abstract legal principle, the court instructed the jury as follows:

"If you find that the defendant was desirous of aiding in the support of his sister, and agreed with the plaintiff alone as an individual to pay her the charges and expenses of the support and care, at her death, over and above the pension the old lady received and was receiving, then the plaintiff would be entitled to recover what such support and care was reasonably worth, considering the situation in life occupied by the old lady and the plaintiff in her life-time."

Taking this in connection with the part of the charge complained of, it sufficiently explains what would be a consideration for the promise in this case.

It is further urged as error that the judge erred in his instructions to the jury where he used this language:

"I charge you that the plaintiff in this case was legally bound to maintain and care for her said mother at her own expense and charge, under the statutes of this State, if she was able to do so. I charge you, further, that the defendant is not legally bound to pay for the expense and maintenance of his sister."

There is no error in this. The statute expressly states whose duty it shall be to support the blind, old, or decrepit person who has no means of support.

Neither did the court err in his instructions to the jury upon the question as to who had the right to bring an action in case they should find that the promise was made upon the part of the defendant to pay for such support. The testimony was conflicting. The husband of the plaintiff at first swore that the promise was made to him personally, and afterwards to himself and wife jointly. The plaintiff herself testified that the promise was made to herself and husband jointly. The court instructed the jury that, if they should find the fact to be that the promise was made to the husband and wife jointly, the wife could not recover in this action in her

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own name. There was no testimony in the case showing that the husband had sold or assigned his interest in the claim against the defendant to his wife previous to the bringing of the suit. He testified that he did not know of his wife bringing this suit at the time of it. He says: "She told me she had, or was talking about it." He further testified that he was willing that she should bring the suit in her own name for the recovery of this money. But this statement is not an assignment, nor an equivalent to the assignment, of his interest in the claim.

These are all the errors relied upon in plaintiff's brief. The judgment is affirmed.

The other Justices concurred.

WILLIAM H. OLNEY AND FRANK MCMURDIE v. THE GERMAN INSURANCE COMPANY OF FREEPORT, ILLINOIS.

Fire insurance—Condition in policy—Change of interest—Partnership—Execution of chattel mortgage by one of firm.

1. A stipulation avoiding an insurance policy if the property be or become incumbered by a chattel mortgage, unless otherwise provided by agreement indorsed upon or added to the policy, is reasonable and valid.
2. The execution by one partner of a chattel mortgage upon the partnership property for his individual benefit works such a change in the *interest* of the firm as will avoid the policy, under a stipulation that it shall be void if the property be or become incumbered by a chattel mortgage, unless otherwise provided by agreement indorsed upon or added to the policy, or if any change other than by the death of the insured takes place in the *interest*, title, or possession, whether by legal

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process or judgment, or by the voluntary act of the insured, or otherwise.

Error to Wayne. (Hosmer, J.) Argued October 7, 1891. Decided October 30, 1891.

Assumpsit. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

George W. Bates, for appellants, contended:

1. The mortgage was not a valid incumbrance on the insured property, and conveyed no specific interest in it.

a—The interest of a partner is not separable, and cannot be seized, nor can any part of the partnership property be taken, on process against either partner, but only that which may be determined to exist on a settlement of the partnership; citing *Sirrine v. Briggs*, 31 Mich. 443; *Haynes v. Knowles*, 36 Id. 407; *Hutchinson v. Dubois*, 45 Id. 143.

b—Such a mortgage passes no title to and creates no lien upon the firm property, and does not affect the right or title of the mortgagor's copartner, and is absolutely void as against the partnership or its creditors; citing Jones, Chat. Mort. § 45; *Deeter v. Sellers*, 102 Ind. 458; *Smith v. Andrews*, 49 Ill. 28; *Caldwell v. Scott*, 54 N. H. 414; *Viles v. Bangs*, 36 Wis. 135; *Nichol v. Stewart*, 36 Ark. 612; and in *Kingsbury v. Tharp*, 61 Mich. 216, a bill of sale made by one partner of the partnership property, to secure his individual debt, was held void as against the partnership and its creditors, and as not affecting the right or title of his copartner, unless sanctioned or authorized by him; and in *Walker v. White*, 60 Mich. 427, a mortgage made by one partner on the firm property, which embraced the individual indebtedness of the mortgagor as well as that of the partnership, was held void as to the individual indebtedness; and see *Osborne v. Barge*, 29 Fed. Rep. 725; *Rogers v. Batchelor*, 12 Pet. 221; *Hotchin v. Kent*, 8 Mich. 526; *Edwards v. Hughes*, 20 Id. 289; *Chase v. Iron Works*, 55 Id. 139; *Towle v. Dunham*, 76 Id. 251.

c—Such a mortgage is a void mortgage, and is not enforcible as against the partnership or the mortgagor's copartner, who can ignore it, and as such would not vitiate the policy under the clause against incumbrances. A mortgage, to affect insurance, must be valid and enforcible; citing *Pitney v. Insurance Co.*, 65 N. Y. 26; *School-district v. Insurance Co.*, 62 Me. 330; *Copeland v. Insurance Co.*, 6 Pick. 197; *Scammon v. Assurance*

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Co., 9 Ins. Law J. 715; Wood, Ins. § 312; 1 May, Ins. § 269; and the same principle is applied to subsequent insurance, under a clause against additional insurance without the consent of the company, which is held not to affect the prior insurance unless the latter is valid and effectual; citing *Clark v. Insurance Co.*, 6 Cush. 347; *Philbrook v. Insurance Co.*, 37 Me. 137; *Jackson v. Insurance Co.*, 23 Pick. 418; *Hubbard v. Insurance Co.*, 33 Iowa, 325; and in *Insurance Co. v. Sewing-machine Co.*, 41 Mich. 137, a mortgage on a homestead, not signed by the wife, was held not to vitiate a policy under the clause against incumbrances, the policy having reference, as held by the Court, to a valid incumbrance; and in *Miller v. Insurance Co.*, 18 Phila. 551, the policy was in favor of a partnership, and, in answer to a question if there was any incumbrance on the property, the applicant answered, "No," and it was held that a judgment against one partner was not such an incumbrance as required the court to hold, as a matter of law, that there had been a breach of warranty.

2. The mortgage did not effect a change of interest in the property.

a—In this State a chattel mortgage is a mere security, and simply creates a lien, with the right in the mortgagee to resort to it only for the purpose of obtaining satisfaction of his mortgage debt out of the property. The ownership remains the same, and is thus absolute, and depends upon no condition; citing *Lucking v. Wesson*, 25 Mich. 443; *Kohl v. Lynn*, 34 Id. 360; *Farrington v. Bristol*, 35 Id. 28; *Gardner v. Matteson*, 38 Id. 200; *Haynes v. Leppig*, 40 Id. 602; *Wilson v. Montague*, 57 Id. 638.

b—It is equally well settled that such a conveyance will not vitiate the insurance under a like condition of a policy, which provided that "if the property be sold or transferred, or any change takes place in the title or possession, the same is void," upon the ground that a chattel mortgage does not operate as a change of interest; citing *Shepherd v. Insurance Co.*, 33 N. H. 232; *McLaren v. Insurance Co.*, 5 N. Y. 151; *Van Deusen v. Insurance Co.*, 1 Rob. Sr. Ct. 55; *Pollard v. Insurance Co.*, 42 Me. 221; *Insurance Co. v. Eddy*, 55 Ill. 213; and see *Hennessey v. Insurance Co.*, 28 Hun, 98; *Insurance Co. v. Connor*, 20 Bradw. 297; *Hubbard v. Insurance Co.*, 33 Iowa, 333; Wood, Ins. § 324.

3. Forfeitures are not favored in the law, and must be strictly construed; citing *Lyon v. Insurance Co.*, 55 Mich, 146; and they cannot be established except for the precise breach of the condition; citing *Bates v. Association*, 51 Mich. 587; nor will liberal intendments and enlarged construction be indulged in

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favor of such forfeitures; citing *Insurance Co. v. Spankneble*, 52 Ill. 53; *Bonenfant v. Insurance Co.*, 76 Mich. 658; *McMaster v. Insurance Co.*, 55 N. Y. 222.

Howard & Roos, for defendant, contended:

1. The mortgage is perfectly valid as between the mortgagor and mortgagee, and is only void, if at all, as to the firm creditors and the mortgagor's copartner, and it is not void as to them; the law simply makes it subject to the rights of such creditors; citing Jones, Chat. Mort. § 45; *Thompson v. Spittle*, 102 Mass. 207; *Durkee v. Stringham*, 8 Wis. 1.
2. Again, in this State each partner is entitled to his $250 exemption as against all creditors; citing *Skinner v. Shannon*, 44 Mich. 86; and in *Waite v. Mathews*, 50 Mich. 392, the Court held that partners had a right to mortgage property to the extent of the exemption of the partnership without being guilty of fraud upon anybody.
3. It certainly cannot be logically contended that each partner can, at his own will and whim, violate the conditions of the policy with impunity, and that the company has no redress unless the violation is the joint act of the insured. For a case in point on this proposition, as well as upon the question of one partner mortgaging his partnership interest, see *Hicks v. Insurance Co.*, 71 Iowa, 119.

LONG, J. The plaintiffs were partners, carrying on a grocery business in the city of Detroit.

On the 1st day of May, 1890, they procured a policy of insurance of $400 in the defendant company,—$250 on a stock of flour, feed, and other goods, and $150 on hay, etc. The policy was for one year. After the insurance was procured, it appears one of the plaintiffs gave a chattel mortgage upon the property described to secure an individual debt of his. On July 12, 1890, the goods caught fire, and were destroyed and injured to the extent of $319.87. The defendant company had no knowledge of the chattel mortgage until after the fire. It refused to pay the loss, and on the trial in the circuit court the jury was instructed to find a verdict for the defendant. Plaintiffs bring error.

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The policy sued upon is what is known as a "Michigan Standard Policy," and contains this clause:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage; or if any change other than by the death of the insured takes place in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured, or otherwise."

The defense to the action is based upon the proposition that the placing of the chattel mortgage by one partner upon the partnership property for his individual benefit works a change in the *interest* of the insured, so that the policy becomes void under the stipulations above quoted, contained in the policy.

This stipulation in the policy in regard to giving chattel mortgages is valid and reasonable, and we think the court below not in error in directing verdict for defendant. The placing of the chattel mortgage by one partner for his individual benefit upon the partnership chattels works a change of interest therein. In *Hicks v. Insurance Co.*, 71 Iowa, 119 (32 N. W. Rep. 201), it was held that:

"A condition in a fire insurance policy issued to a firm, that the property should not afterwards be in any manner incumbered, was violated by the execution of a mortgage by one of the partners on his undivided one-third interest in the property, and by a judgment against him, which became a lien on his said interest."

We think the company discharged from liability on the policy by such an incumbrance without its knowledge, or any notice to it, and its assent thereto. The placing of the chattel mortgage thereon by one partner may not have changed the title or possession, but there was a

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hange of interest, which was provided against by the olicy.

The court was not in error in directing verdict and ndgment for defendant.

The judgment of the court below will be affirmed, with osts.

The other Justices concurred.

NELS DAMM v. JAMES GOW AND JOHN CAMPBELL.

Justice of the peace—Evidence—Explanation of docket.

justice's docket showed that a summons was made returnable September 8, and returned personally served Sept. 1, and that a judgment was rendered Oct. 8, but failed to show any adjournment of the case. The several dates were entered in the left-hand margin of the docket, and ditto marks appeared under the abbreviation "Sept.," over which marks the abbreviation "Oct." had been written as the date of the judgment entry, the marks appearing in the letter "O." And it is held competent to explain by the testimony of the justice the appearance of the entries; and that if the judgment was actually rendered on September 8, and that day entered at the time, and the abbreviation "Oct." afterwards written over it, either by mistake or design, such facts might be shown by the justice who made the entries.

Error to Muskegon. (Dickerman, J.) Argued October 1891. Decided October 30, 1891.

Garnishment. Plaintiff brings error. Reversed. The cts are stated in the opinion.

Jones & Clark, for appellant, cited no authorities.

DeLong & O'Hara, for defendants, contended as stated

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in the opinion, citing the authorities therein [illegible], and—

1. That, in order to give the justice jurisdiction to render the judgment against the principal defendant, who did not appear, the officer's return must show that he complied with the statute as to the manner of serving the summons, namely, by delivering to the defendant a copy thereof, which fact does not appear in the docket, and there was no other evidence of the service before the circuit court on the trial of this case; citing *Campau v. Fairbanks*, 1 Mich. 151; *Smalley v. Lighthall*, 37 Id. 348; *Alverson v. Dennison*, 40 Id. 179; and, the judgment against Lambert being void, the garnishee proceedings must fall with it; citing *Segar v. Lumber Co.*, 81 Mich. 344.

CHAMPLIN, C. J. This is a suit against garnishees. Upon the trial in the court below it became material to introduce in evidence the judgment obtained against the defendant in the original suit, which was rendered before a justice of the peace, and plaintiff offered the docket of the justice to prove such judgment, which docket is in the form and reads as follows:

"Nels Damm, Plaintiff, *vs.* Isaac Lambert, Defendant. } *Assumpsit.*

"In justice court before Frank H. Bassett, justice of the peace.

1890.

Aug. 30. Summons issued returnable at my office in the city of Muskegon on the 8th day of September, 1890, at one o'clock in the afternoon.

Sept 1. Summons returned personally served on said defendant by N. Holthe, deputy-sheriff, on the 30th day of August, 1890, within the county of Muskegon. Fees, $.75.

Oct. 8. At one o'clock in the afternoon cause called. Plaintiff appeared in person by Arthur Jones, his attorney. Defendant did not appear. After waiting one hour, and defendant not appearing, I proceeded with the trial of said cause. Plaintiff declared orally on all the common counts

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in *assumpsit*, and claimed damages $300. Nels Damm, plaintiff, sworn and testified in his own behalf. After hearing the evidence, and due consideration being had thereon, I thereupon rendered judgment in favor of said plaintiff and against said defendant for the sum of forty-four and ninety-nine hundredths dollars damages, together with two and ninety-five hundredths dollars costs of suit.

"FRANK H. BASSETT,
"Justice of the Peace."

The dates, as appears from the docket, were entered in the left-hand margin, and under the abbreviation "Sept." are marks thus ("), representing ditto, and over these marks the abbreviation "Oct." has been written, the marks appearing in the letter "O." Defendants objected to the introduction of the docket in evidence for the purpose of proving the judgment, for the reason that it appeared to have been rendered October 8, and from the docket entries the justice had lost jurisdiction, and the judgment was therefore void. Plaintiff produced the justice, and offered to show that the judgment was rendered September 8, and that it was so entered on his docket as of that date, and to explain how the word "Oct." came to be written over the characters indicating that the judgment was entered September 8; but the circuit judge refused to permit such testimony, and excluded the docket.

The court erred. The plaintiff should have been permitted to explain by the testimony of the justice, who was the custodian of the docket, the appearance of the entry, where two months are indicated in the margin opposite the figure denoting the day of the month. If the judgment was actually rendered on September 8, and that day was entered at the time, and another month

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was written over it after that time, either by mistake or design, it was competent to show those facts by the justice who made the entries. It cannot be permitted to allow the justice to nullify a judgment upon his docket by changing the date upon which the judgment was actually entered, and none of the authorities cited justify such holding. In *Mudge v. Yaples*, 58 Mich. 307, the attempt was made to supply by oral proof the time when the parties appeared, and it was held that this could not be done; but here the docket shows the time, but it is made uncertain by another time also appearing upon the docket, and upon the face of the docket it is uncertain which is the original entry. *Weaver v. Lammon*, 62 Mich. 366, does not support the defendants' contention. It would be in point if the only date appearing upon the docket as to time of appearance and entry of judgment were October 8, but such is not the case. It was again said in *King v. Bates*, 80 Mich. 367, that jurisdictional facts in justice's court cannot rest in parol. In this case the fact does not rest in parol, but is duly entered, and the testimony offered was for the purpose of showing that fact by identifying the original entry as between the two conflicting dates.

The judgment must be reversed, and a new trial granted.

The other Justices concurred.

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GEORGE A. DUPUIS v. THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY.

Statute of frauds—Promise to pay debt of another.

After plaintiff had entered upon the performance of a contract made with a contractor of defendant to do some dredging, one of the defendant's officers said to him that the defendant would keep enough of the contractor's money back to pay plaintiff for the work he would do dredging, and another officer remarked that it was pretty early to do that, to which the first officer responded "we have to do the work; we cannot let it be delayed,"—which promise or guaranty is held to come within the statute of frauds.

Error to Wayne. (Gartner, J.) Argued October 6, 1891. Decided October 30, 1891.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Sidney T. Miller, for appellant, contended:

1. There can be litttle question that there was a good guaranty in this case. The true test is, "was the transaction in essence his own, while the securing of the third person's debt to the promisee was a mere collateral consequence, or was the latter its direct object?" citing Bish. Cont. § 1268; *Calkins v. Chandler*, 36 Mich. 320; *Fears v. Story*, 131 Mass. 47; *Merriman v. McManus*, 102 Penn. St. 102; *Crawford v. Edison*, 45 Ohio St. 239; *Emerson v. Slater*, 22 How. 35, 43; *Greene v. Burton*, 59 Vt. 423.
2. The court erred in admitting as evidence the papers in another suit, its pendency not being pleaded in abatement; citing *Sullings v. Goodyear Co.*, 86 Mich. 313; Gould, Pl. chap. 5, § 153.

Brennan & Donnelly, for defendant, contended:

1. Defendant's promise was within the statute of frauds, and under no circumstances could plaintiff hold defendant and Gibney severally liable at his option; citing *Welch v. Marvin*, 86 Mich. 59; *Baker v. Ingersoll*, 89 Id. 158; *Preston v. Zekind*, 84 Id. 643;

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Gray v. Herman, 75 Wis. 453; *Bresler v. Pendell*, 12 [illegible]
Bates v. Johnrowe, 57 Id. 521.

LONG, J. This action was brought in the Wayne circuit court upon claim made under the following bill of particulars:

To 11¼ days' work of dredge Hercules and her crew	$878 50
To changing dipper on dredge	75 00

The plaintiff had verdict and judgment by direction of the court for $150. He is not satisfied with the amount of the judgment, and brings the case to this Court by writ of error.

The claim made on the part of the plaintiff is that on or about the 29th day of November, 1889, the plaintiff, who was proprietor of a dredge, met one Gibney at the office of the defendant, and learned from him that certain dredging was needed to enable the laying of a natural gas main across the river Rouge, near Detroit. Gibney stated at the time that all there was to be done was the sloping of the banks of the river (not more than a day's work for the dredge), which Dupuis agreed to do if paid for the use of the dredge from the time it left its moorings; this agreement being afterwards ratified by a letter from Dupuis, offering to do this work for $75 a day, and an acceptance by Gibney, also by letter.

In pursuance of this agreement, Dupuis sent his dredge on Monday, December 2, to the place at which the pipe-line was to cross the stream, but found nobody there at first to tell him what to do; so he started to work on what Gibney had told him he wanted done, *i. e.*, the sloping of the banks, and nearly finished it on the same day. On that Monday night Dupuis went to the office of the defendant, and there told Mr. Lambing, one of the officers of the defendant, that he would not go on

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e work unless some one came to show him what to do, and Mr. Lambing accordingly promised to send the defendant's engineer the next morning to take charge of the work. The next morning Mr. Lambing himself appeared, and instructed Dupuis to dig a trench along a certain line, which was done. Dupuis at this time told Lambing that the pipes could not be laid on the bottom, as it then lay, as the Rouge was to be dug deeper by the government, and that he could not do the work they required. This he also told three officers of the company whom he met at the company's office, and advised them to get Hiram Walker's dredge, which he thought could do the work. They answered that they had no time to lose, as the main must be laid to the city within a time specified, and asked him if he could not so change his dredge as to do the work, at the same time telling him he was working for Gibney, who was the contractor.

The plaintiff claims that at this time he said to them that from the wording of the letter he understood he was acting for the company, but was told by Mr. Lambing that he was not, but that he was working for Gibney, the contractor; that he said he was sorry for that, and was then asked by Lambing if he understood it now, and he said he did; that Mr. Campbell, another officer of the company, was present, and said to Mr. Lambing:

"We know Mr. Dupuis, and we can tell him that we will keep enough of Mr. Gibney's money back to pay him for the work he will do dredging."

That Mr. Lambing said, "It is pretty early to do that," when Campbell responded: "We have to do the work; we cannot let it be delayed;" that they then asked him to fix a maximum charge for the changes on the dredge, which he did, and signed a paper agreeing that

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such changes should not cost more than $150; that, relying on these promises, he went on and did the work, and now claims the full amount of dredging and change of dredge against the defendant company.

The claim is further made by the plaintiff that there was no testimony which warranted the court in limiting the amount to be recovered to $150, but, on the contrary, that the testimony of the plaintiff shows there was either—

1. A good guaranty for the payment of the full amount due the plaintiff for the dredging, including the work contracted for by Gibney; or—

2. A contract between the company and the plaintiff for all of the work, except the sloping of the banks.

The only question involved is whether the promise made by the defendant's officers to pay the plaintiff for the work and labor comes within the statute of frauds. It clearly appears that the original contract was made with Gibney, and there was no misunderstanding upon the part of the plaintiff when he commenced the work as to who was the person liable on the contract. The plaintiff expressly stated to Mr. Lambing, defendant's manager, that he understood the contract was with Gibney, and, after the work was completed, presented his bill to Gibney, and commenced suit against Gibney & Co. for the claim he now seeks to recover against the defendant, making defendant company garnishee defendant in that proceeding. That suit is yet pending.

It is evident from the whole record that the plaintiff did not understand that the defendant company ever became liable upon the original promise to pay for the work, and we think the company could not be held liable upon the guaranty claimed to have been made by defendant's officers to pay Gibney's debt. The defendant

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was properly held liable by the court below for the cost of making changes in the dredge. The other part of the claim made by the plaintiff falls directly within the statute of frauds. It appears that the original promisor, Gibney, has not been discharged from liability on the contract; that contract appears yet to be in existence, and uncanceled. In *Baker v. Ingersoll*, 39 Mich. 158, it was held that—

"A verbal promise to pay for material furnished to another person on a contract made with him, and not with the promisor, cannot be enforced so long as the original contract remains uncanceled."

We think the case falls directly within the ruling of this Court in *Welch v. Marvin*, 36 Mich. 59. See, also, *Baker v. Ingersoll*, 39 Mich. 158; *Preston v. Zekind*, 84 Id. 641; *Gray v. Herman*, 75 Wis. 453 (44 N. W. Rep. 248).

Some claim is made by plaintiff's counsel that the court below was in error in admitting in evidence the papers in the suit brought by the plaintiff against Gibney & Co. Those papers were properly admitted in evidence to show that the claim made by the plaintiff was the identical claim made here, and that it was still in existence, uncanceled, and that plaintiff had not discharged Gibney from liability.

The judgment must be affirmed, with costs.

The other Justices concurred.

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ELIZABETH K. SHERWOOD v. THE CHICAGO & WEST MICHIGAN RAILWAY COMPANY.

[See 82 Mich. 374.]

Railroad companies—Negligence—Evidence—Charge to jury—Competency of jurors.

1. The Court adhere to the opinion reported in 82 Mich. 374, and, as to the new questions raised on the second trial, hold:

   a—It was competent for plaintiff to show that no conductors or trainmen were at the platform when she alighted to assist passengers in alighting, not as a ground of recovery, but as showing the surroundings.

   b—The testimony of the physicians who examined plaintiff's limb and broken bone, as to the *details* of such examination, was competent.

   c—It was not error for the circuit judge, after stating the facts upon which the plaintiff based her right of recovery, and which, if true, warranted him in directing a verdict in her favor, to instruct the jury that, if they found from a fair preponderance of evidence that such facts were established, plaintiff was entitled to recover.

2. During the second trial of a negligence case, the newspapers of the city where the trial was being had published an item stating the amount of the verdict recovered by the plaintiff on the first trial, which was read by members of the jury; whereupon the defendant's counsel requested the court to arrest the progress of the trial and grant a new trial. The application was denied, and error is assigned upon the ruling as prejudicial, and especially so in view of the fact that the second verdict was larger than the first. And it is held that this rule, if established, would render incompetent every juror who knew the amount of the former verdict; that intelligent men, who are the most competent jurors, are usually readers of newspapers, which have the right to publish the verdicts and judgments rendered in the courts; and that the reading of such reports will not render jurors incompetent.

Error to Kent. (Grove, J.) Argued October 6, 1891. Decided October 30, 1891.

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Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion, and in the former report of the case, in 82 Mich. 374.

Smith, Nims, Hoyt & Erwin (*M. J. Smiley*, of counsel), for appellant.

Fletcher & Wanty and *Montgomery & Bundy*, for plaintiff.

GRANT, J. A statement of the facts and general principles governing this case will be found in 82 Mich. 374. The new trial granted resulted in a verdict and judgment for plaintiff. We adhere to the opinion in that case, Mr. Justice LONG speaking for the Court, and in the present case will determine only the new questions raised.

1. It was competent to show that no conductors or trainmen were at the platform where plaintiff alighted to assist passengers in alighting. Plaintiff's counsel disclaimed any right to recover for that reason, but only offered it to show the surroundings.

2. After the trial had been in progress a day some newspapers published and circulated in Grand Rapids, where the trial was in progress, published an item in regard to the former trial, in which was stated the amount of the verdict. It was shown that these articles reached some of the jury. Defendant thereupon requested the court to permit an inquiry to be made to the jury, and ascertain whether they had read these articles, and if they had to arrest the progress of the trial of the case and grant a new trial. The application was overruled. Defendant's counsel insist that this was prejudicial, and especially in view of the fact that the verdict

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in the present case was larger than in the former. This rule, if established, would render incompetent every juror who knew the amount of the former verdict. Intelligent men, who are the most competent jurors, are usually readers of newspapers. Newspapers have the right to publish verdicts and judgments rendered in the courts. The result would be to render incompetent as jurors in many cases nearly all the intelligent residents of a county. It, of course, makes no difference when the jurors learn the amount of the former verdict. It is, indeed, desirable that such things, so far as possible, should be kept from the knowledge of the jury, but, however unwise it may be to publish them at the time of the trial, no violation of law is committed in so doing, nor will the reading of them by jurors render them incompetent.

3. Two physicians examined the plaintiff's limb and broken bone, and testified as to the details of their examination. To this the defendant's counsel objected, insisting that it was only proper for these physicians to state the result of their examination, and that the minute details thereof were unnecessary, and prejudicial. The value of the evidence of these physicians depended very largely upon the thoroughness of their examination, and the indications they found that the bone was broken. We find no error in this.

4. Defendant had introduced evidence tending to show that plaintiff had her arms full of bundles. Plaintiff's son was called as a witness, and testified that there was no package at the depot platform that he knew of. Immediately after, the witness testified that he did not know of any package at that time, but he knew of it afterwards. Defendant's counsel objected to this testimony, and after it was concluded plaintiff withdrew it from the consideration of the jury. We see

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error in this which could prejudice the defendant's case.

5. The circuit judge, in instructing the jury, stated the facts upon which the plaintiff based her right of recovery, and added:

"And if you should find from a fair preponderance of evidence that the facts are as stated in the claim of plaintiff just read to you, then she is entitled to recover in this action."

Error in this is alleged, in that it left out of the consideration of the jury the question of negligence. I can find no reason in this complaint. If the facts stated by the judge had been established beyond controversy, he should have instructed the jury that the defendant was guilty of negligence. The facts alleged in the declaration either do or do not make out a case of negligence. It is always a question of law for the court to decide whether the declaration states a cause of action, and it is the usual and proper way to instruct the jury that, if the facts claimed exist, then a case of negligence is made out. This was the course pursued on the former trial, at the request of defendant's counsel, as will appear upon an examination of the opinion.

Judgment is affirmed.

The other Justices concurred.

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SYLVESTER A. STRONG, GUARDIAN OF WILLIAM E. GATES, AN INCOMPETENT PERSON, v. JOSEPH B. TOMLINSON AND GEORGE CORNETT.

[See 72 Mich. 420.]

Mortgage foreclosure—Suit in equity.

Where by the decree of the Supreme Court one of several mortgages is allowed to stand as a valid security for the amount which the Court find the mortgagor has been benefited, but the time for payment and the rate of interest are changed, and the mortgagee enjoined from foreclosing until he has discharged the other mortgages, which are declared void, and surrendered the accompanying notes, the only method of foreclosing the lien created by the decree is by a proceeding in chancery, in which a compliance with the terms of the decree must be alleged and proved.

Appeal from Jackson. (Loveridge, J., presiding.) Submitted on briefs October 8, 1891. Decided October 30, 1891.

Bill to set aside a mortgage foreclosure by advertisement. Defendant Tomlinson appeals. Decree affirmed, and the case remanded for further proceedings according to the opinion and practice of the court. The facts are stated in the opinion.

Blair, Wilson & Blair, for complainant.

Dwight D. Root, for appellant.

GRANT, J. The bill in this case prays for the setting aside of a mortgage sale of land by advertisement, and an assignment of the same from defendant Cornett to defendant Tomlinson, and to restrain the prosecution of a suit at law. The defendants filed separate general

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demurrers. These demurrers were overruled, and defendant Tomlinson appeals.

Gates was adjudged an incompetent February 14, 1885. One Knight was appointed his guardian. Knight filed a bill in chancery against defendant Cornett to set aside mortgages, both real and personal, and notes to a large amount, which had been executed by Gates to Cornett. By the decree of this Court these notes and mortgages, save one, were declared void. The Court found that Gates had received benefits from these notes and mortgages to the amount of $5,534.82, and allowed the mortgage for that sum to stand as a valid security for that amount. *Gates v. Cornett*, 72 Mich. 420. This mortgage, and the note accompanying it, were dated December 18, 1884. The amount was payable in 10 years, at 8 per cent. per annum. The terms of this mortgage and note were changed by that decree in several essential particulars, viz., interest was changed from 8 to 6 per cent., the time of payment was changed, and defendant enjoined from taking any proceedings to foreclose until he had discharged the mortgages declared to be void, and surrendered the notes.

Tomlinson, as assignee of the mortgage, commenced foreclosure by advertisement, and bid in the premises November 29, 1890, for $5,000, and subsequently brought suit on the note to recover the balance. Cornett's solicitors in that case, whom he has not paid, have sued him, and garnished complainant, Strong, now the guardian of Gates. These attorneys appeared at the sale, and protested against it for the following reasons:

"1. That there is no such mortgage of record as the said advertisement describes.

"2. That the original mortgage given to secure the sum of $5,534.82 has been the subject of litigation before the courts of this State, and has been so changed and

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modified by the decree of the Supreme Court of this State that it can only be enforced, if at all, in the court of chancery.

"3. That any attempt to foreclose said mortgage is at this time contrary to the decree of the Supreme Court, the said George Cornett not having surrendered to the said James D. Knight (guardian), complainant, the notes and mortgages in said decree mentioned.

"4. That Blair, Wilson & Blair and Conely, Maybury & Lucking have liens on the money secured to the said George Cornett by the decree of the said court, and that a sale under this advertisement is in fraud of their rights."

It is also charged that the assignment of the mortgage to Tomlinson is not *bona fide*, but colorable merely. Such are the facts alleged in the bill, and upon which relief is asked.

The demurrer was properly overruled. No such mortgage as defendant Tomlinson was attempting to foreclose was upon record. There is nothing upon the face of the advertisement to show any breach of the conditions. On the contrary, it shows upon its face that the mortgage was not due. Cornett and Tomlinson hold a lien created rather by the decree of this Court than by the mortgage itself. Their only method of foreclosing their lien was by a proceeding in chancery, in which they must both allege and prove a compliance with the terms of that decree. This is not a proper case for a statutory foreclosure by advertisement. *Olcott v. Crittenden*, 68 Mich. 230.

The decree is affirmed, with costs, and the case remanded to the court below for further proceedings according to this opinion and the rules and practice of the court.

The other Justices concurred.

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The Commissioner of Highways of the Township of Richmond v. E. Broox Martin.

Highways—Repair of bridge over race—Liability of mill-owner.

1. The exception from the operation of How. Stat. § 1453,—which makes it the duty of all owners of mills or other water-works, where any race or races appertaining to the same may cross a highway, to keep a good and sufficient bridge or bridges over the same,—of mills erected and races dug previous to the formation of the highway, has reference to races existing when the highway was laid out.
2. Where a dam and race were built at the same time, and the earth taken from the race was used in the construction of the dam, which was intended to be and was thereafter used as a highway in place of a portion of an old road destroyed by its construction, and the water was not let into the race until after a bridge had been built over the race, which with the dam was used instead of the old highway and bridge, such race comes within the statute cited, and the owners of the mill used in connection with said race are liable for its maintenance.

Error to Osceola. (Judkins, J.) Argued October 9, 1891. Decided October 30, 1891.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Dumon & Cogger, for appellant, contended:

1. Our claim is that the statute upon which the plaintiff bases his cause of action has no application to cases like this one. By this statute the owners of mill property are exempted from the burden of maintaining bridges over the races in cases where mills had been erected and races dug previous to the formation of the highway. This, we insist, means previous to a highway being laid or used at the point where the highway crosses the race. Now, it appears conclusively from the findings that at the time said race was made there was no traveled road, nor road of any kind whatever, within the limits of the present

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highway at the point where said highway crosses said race. It further appears that the bridge was built across the race in May, 1876; that the public first began crossing over the dam in the fall of the same year; that not until in December, 1878, was an attempt made to locate a lawful public highway over said dam and race, at which time the common council of Reed City adopted a resolution to locate the highway, formerly on the section line, on and across said dam; and that in June, 1883, the highway commissioner of Richmond township laid out a public highway over said dam and race. These facts clearly appear, and, under the previous decisions of this Court, judgment ought to have been rendered on the findings in favor of the defendant; citing *Merrill v. Kalamazoo*, 35 Mich. 211, 219.

C. M. Beardsley (*C. H. Rose*, of counsel), for plaintiff.

MORSE, J. The plaintiff sued defendant in justice's court for expenses incurred in June, 1890, in repairing a highway over a mill-race owned and occupied by defendant in the township of Richmond, Osceola county, claiming that it was the duty of defendant to maintain the same, and obtained judgment.

On appeal to the circuit, the circuit judge found substantially the following facts:

"1. That in the year 1866 a highway was laid out and opened on the section line between sections 9 and 10, in the township of Richmond, Osceola county, Mich., by the commissioner of highways of said township.

"2. That soon after said highway was laid out and opened up a bridge was built within the limits of said highway, where it crossed a stream called the 'Hersey Branch' of the Muskegon river. The main span of said bridge was about 50 feet in length, the approach at the south end about 16 feet in length, and the approach on the north end about 20 feet in length, which said bridge and approaches thereto were planked, and beyond the approach, on the north end, was a causeway for a distance, which approach and causeway could have been without much expense filled in and made a good dirt road.

"3. That the firm of James M. Reed & Co., of Reed City, Mich., on or about the 18th day of June, A. D.

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872, petitioned the board of supervisors of Osceola ounty for a permit to build a dam across said Hersey ranch. Permission was given by the said board to construct said dam, with the proviso that, in case its onstruction should in any way interfere with or damage he bridge or highway, the said James M. Reed & Co. hould be liable for all such damages, and should make ll needful repairs at their own expense, the same to be ccepted by the commissioner of highways of Richmond.

"4. That in the years 1874 and 1875, and in the spring f 1876, J. M. Reed & Co. built a dam near the section ine between sections 9 and 10 of said township, where aid section line crosses said Hersey branch, and down he stream from said section line to the bank on the outh-easterly side of said stream, which dam and pproaches were, and are at the present time, 30 or 40 ods in length. * * * * * * * * * *

"5. That when said J. M. Reed & Co. commenced the rection of said dam they began by the digging of the ace through the bank on the south-easterly side of said tream, leading from the prospective mill-pond easterly to nother point in said stream, a distance of some 30 or 0 rods, and that the said dam and race and approaches vere built simultaneously, the earth taken from the race eing used in the construction of said dam and pproaches.

"6. That before J. M. Reed & Co. commenced the onstruction of said dam they knew that the building of t, and raising the water in the pond so created for nanufacturing purposes, would destroy the highway on he section line between sections 9 and 10 for a long disance, and would also destroy the bridge on said highvay over said Hersey branch.

"7. That J. M. Reed & Co. understood and agreed hat they would build said dam and approaches thereto, nd make the same for a highway leading from the said ection line running north of said stream to the said sec ion line on the south side of said stream; and when hey commenced the construction of said dam it was heir intention that the same should be used when completed as and for a highway, and they built said dam nd race with that in view, to compensate the township or the destruction of the highway already laid out and n use on the section line between sections 9 and 10, at the point or place where the same crosses said Hersey

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branch, and for some distance on either side of the same, and the bridge erected thereon.

"8. That said Reed & Co. constructed a waste-weir and chute in said dam on the north end thereof, about 50 feet in length, and at the time of the building of said dam erected a bridge over said waste-weir and chute, except the planking on the top thereof, and the said Reed & Co. built a bridge over the said race in May, 1876; that the bridge so built by Reed & Co. over said race was 24 feet in length and 14 feet in width, and the bridge maintained over said race since the construction thereof by Reed & Co. is of the same length and width.

"9. That J. M. Reed & Co. understood and agreed that they should make and maintain said bridge over said race after the erection thereof by them.

"10. That said bridge so built by them over said race was not within the limits of the old highway on the section line between sections 9 and 10 in said Richmond township.

"11. That the public began using said highway so built by Reed & Co. over their said dam, race, and approaches leading thereto from the said section line between sections 9 and 10, and given to the public by Reed & Co. to compensate the township of Richmond for the destruction of the old highway on the section line between said sections 9 and 10, in the fall of 1876, and since that time they have continued to use the same continuously for a public highway.

"12. That the erection of said dam, and raising the water in the pond adjacent thereto, destroyed the old highway and the bridge on the section line between sections 9 and 10 the entire length of said dam.

"13. That the said highway on the section line between sections 9 and 10, in said township, and the new route over the said dam and race, lead from a point several miles north of the village of Reed City, south into and through said village.

"13½. That said James M. Reed & Co. owned the lands on both sides of the highway destroyed by the erection of said dam on said section line between sections 9 and 10, in said township of Richmond, and had owned said lands for some time prior to the erection of the same; and they also owned the lands upon which said dam was erected and race dug at the time said dam was built and race dug, and had owned the same for some time prior

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thereto. They also owned the lands between and leading from said dam to said section line between sections 9 and 10 at the time of the erection of said dam, and the digging of said race and bridging the same, and had owned the same for some time prior to that time, and also owned the same at the time said dam and bridge over said race were first commenced to be used as a highway."

14. That the defendant had acquired and held in June, 1890, the said water-power, and lands connected therewith, of James M. Reed & Co. Reed & Co. deeded to one George W. Morris or Morris & Martin, and defendant obtained his title of Morris.

"15. That at the time of said purchase by Morris, for the firm of Morris & Martin, from J. M. Reed & Co., said dam and bridge over the race and waste-weir and chute were being used as a highway by the public, being the main thoroughfare leading through the village of Reed City, and north of said village for several miles, of which fact Morris & Martin had actual knowledge, and that the same has been used as such since the fall of the year 1876.

"16. That at the time of the purchase of said water-power, and the land in connection therewith, by Morris & Martin, the testimony of the plaintiff shows that Morris was notified by Reed & Co. that it was the duty of said Reed & Co. to maintain the said bridge over said race, and that if he became the purchaser of said water-power, and the land in connection therewith, they (Morris & Martin) would have to maintain the same, which they agreed to do. This is denied by the testimony of the defendant. The proofs on the part of the defendant tended to show that Reed & Co. informed said Morris & Martin that they had completed the obligations on their part to be performed when the bridge over the race was completed, and that the village of Reed City would keep in repair the bridges over said dam and race. As to which of the two theories is correct I do not decide, as I do not deem it necessary in the determination of this case.

"17. That after the purchase of said water-power and lands by Morris & Martin, and during the year 1877 the said Morris & Martin built a grist and flouring mill for their own use adjacent to said race so dug by Reed & Co. to be used in connection with said water-power, which mill was built on the east side of said dam and

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highway over the same, and said mill being the first one erected on said race or on said water-power by any one, and the said water-power had been used for no purpose till after the erection of said mill by Morris & Martin.

"18. That during the year 1885 the north part of the said dam broke away, and a portion of the bridge over the waste-weir and chute was destroyed. Morris & Martin repaired the dam, but neglected to repair the bridge, and, after the commissioner of highways of said township had notified Morris & Martin to repair the same, they refused so to do, and said commissioner proceeded to repair it; and during the years 1883 and 1884 the bridge over said race got out of repair, and the highway commissioner, after notifying said Morris & Martin to repair the same, and they refusing to do so, repaired said bridge.

"19. That the bridge over the waste-weir and chute is now 132 feet in length, and has been of that length since the year 1885.

"20. That in the year 1875 the village of Reed City was incorporated by Act No. 331 of Local Acts of 1875, which was approved April 16, 1875; that the water-power, and land connected therewith, are within the corporate limits of said village.

"21. That October 18, 1876, the common council of the village of Reed City, by resolution, instructed the street commissioner of said village to procure planking material for planking the bridge over the waste-weir and chute on the north end of said dam; that Reed & Co. had expended a considerable sum of money in building said dam and the highway, and the bridges on the same, and the council of the said village of Reed City procured said material to assist said Reed & Co. in completing said bridges.

"22. That December 9, 1878, the following action was taken by the council of the village of Reed City:

"'Moved and supported that the highway formerly on the section line be located on and across the dam of Morris & Martin and its approaches.'

"June 26, 1882, the following action was taken by the council of the village of Reed City:

"'Moved that Morris & Martin be authorized to raise the bridge across the river at the dam, and bring in bill for same.'

"23. That in June, A. D. 1883, the commissioner of highways of Richmond township, upon a survey furnished him by the defendant in this case, which survey was

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nade at defendant's request and at his own expense, nade an order laying out a highway; * * * that this rder of the said commissioner did not change the route f the highway traveled by the public from the north nd of said dam over said dam and race to the section ine, except at a point south of said dam proper and aid race.

"24. That the reason the said commissioner made said rder by which a change was made in the location of the ighway south of said race was to give said defendant nore room for a door-yard, said defendant intending to rect a dwelling-house at a point a short distance south f said race.

"25. That the water from said mill-pond, ponded and eld back by said dam, was first let into said race in the atter part of the year 1876, which was after the bridge ver said waste-weir and race had been used by the ublic as a highway.

"26. That before the commencement of this suit, and n June, A. D. 1890, the bridge over said race became ut of repair and unsafe to travel, and the commissioner f highways of Richmond township requested the defend-nt in this suit to repair the same, which the defendant eglected and refused to do, whereupon the commissioner epaired the same, and expended in making such repairs he sum of $19.08. * * * * * * * * * *

"27. That the mill-race in question was commenced in 874, completed in 1875, and the head-gate put in in the pring of the year 1876; that at the time the excavation or said race was dug and said race made there was no raveled road, nor road of any kind whatever, within the imits of the present highway at the point where said ighway crosses said race."

The conclusion of law upon these facts was that the laintiff was entitled to recover, and judgment was endered in his favor..

The plaintiff's declaration counted specially upon the tatutes, and added the common counts. The statutes elied upon are as follows:

"SEC. 1453. *The People of the State of Michigan enact,* hat it shall be the duty of all owners, occupiers, or ossessors of mills or other water-works, where any race

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or races appertaining to the same may cross a public highway, to keep a good and sufficient bridge or bridges, not less than fourteen feet in width, with a substantial railing on each side thereof, over the same, except where said mills have been erected and the races dug previous to the formation of said highway.

"SEC. 1454. In all cases where the owner or owners, occupiers or possessors, of any such mill or mills, or other water-works, shall refuse or neglect to make such bridge or bridges, or shall refuse or neglect to keep the same in good repair, it shall be the duty of the commissioner of highways of the township in which said highway may be to proceed forthwith to erect or repair such bridge or bridges, at the expense of the person or persons whose duty it was to have erected or repaired such bridges.

"SEC. 1454. The expenses so made or incurred by said commissioner of highways, in erecting or repairing such bridge or bridges, shall be a legal charge against the owner or owners, occupiers or possessors, of such mill or mills, or other water-works; and it shall be the duty of the said commissioner of highways to prosecute the person or persons so chargeable, on an action of *assumpsit*, for the expenses so made or incurred, and to cause the damages recovered in such prosecution to be applied towards the payment of said expenses."

The defense is a technical one. It is contended that the case does not fall within the statute because the race was dug before the highway was used or established.

It plainly appears from the finding of the circuit judge that a long distance of the old highway was destroyed by the building of the dam below it, thereby raising the water of the pond over it, and that the old bridge across the Hersey was rendered useless by it; and it was contemplated by all parties that the dam should be used as a highway in the place and stead of the portion of the old road so destroyed. The bridge over the race was built by J. M. Reed & Co. upon the understanding that it was their duty to do so, and to maintain it after it was constructed.

It is true that the circuit judge finds that when the

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race was dug there was no highway where the present highway crosses the race, but he also finds that the dam and race were built at the same time, the earth taken from the race being used in the construction of the dam, and that the water was not let into this race until after the bridge had been built, and the highway over the dam and race in use in the stead of the old highway and bridge, abandoned because destroyed by this dam and race. To all intents and purposes it must be considered that this race comes within the statute.

The exception in the statute upon which the defendant relies, to wit, "except where said mills have been erected and the races dug previous to the formation of said highway" (How. Stat. § 1453), clearly has reference to races existing when the highway is laid out, and for the reason that it would be an injustice to require a mill-owner to bridge his race every time and in every place the authorities saw fit to run a highway over it. But in this case the building of the dam, which necessitated the race and caused it to be dug, destroyed an existing highway and bridge, and made it necessary to change the highway to this dam, and to build two bridges, one over the waste-weir and one over the race. It was the same, in effect, as if the dam had been built above the old highway and bridge, and the race dug across the old road. The building of this dam and race made it necessary that two bridges should be built where only one existed before. It was so understood at the time, and therefore the highway was changed, and the bridge over this race built at the expense of the mill-owners. It must be held that they are bound to maintain it.

The judgment is affirmed, with costs.

The other Justices concurred.

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BENJAMIN WOLF AND DAVID WOLF v. WILLIAM O'CONNER.

[See 83 Mich. 301.]

Assignment for benefit of creditors—Preferences—Execution purchaser—Bill to quiet title.

1. An assignment for the benefit of creditors, executed prior to the passage of the statute regulating the making of such assignments, which prefers creditors without naming them either in the body of the assignment or in a schedule annexed at the time of its execution, is void upon its face as to non-consenting creditors.
2. It has never been decided in this State, in cases arising previous to the passage of Act No. 95, Laws of 1867, regulating the practice in cases where a levy is made upon the equitable interest of a judgment debtor, that an execution purchaser cannot attack a conveyance made in fraud of creditors, either in an action of ejectment or by bill in equity to remove a cloud upon the title.[1]

Rehearing, upon application of complainants, of case reported in 83 Mich. 301. Submitted January 8, 1891. Decree affirmed October 30, 1891. The facts are stated in the opinions.

G. A. Wolf (*E. F. Uhl*, of counsel), for complainants.

Russell C. Ostrander, for defendant.

CHAMPLIN, C. J. We granted a rehearing in this case

[1] Act No. 95, Laws of 1867 (How. Stat. § 6108), provides that, in case of a levy upon the equitable interest of a judgment debtor, the judgment creditor may, before sale, institute proceedings in aid of said execution, to ascertain and determine the rights and equities of said judgment debtor in the premises so levied upon; and that, in case of a sale of said premises without having ascertained and determined such interest, he shall, within one year, institute proceedings to ascertain and determine the same, and to settle the rights of the parties in interest therein.

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upon the application of the complainants, and the case has again been submitted to us for our consideration. The opinion handed down by us is reported in 83 Mich. 301.

One of the points made upon the original hearing was that the instrument was void upon its face. In the opinion handed down we said that the complainants had failed to point out the reason of their assertion that the deed of assignment was void upon its face; but in their motion for a rehearing they have stated the grounds upon which this claim is made, and to which our attention is now challenged. It is claimed that the assignment is void upon its face because it declares preferences in favor of certain creditors, and such preferred creditors are not named either in the body of the instrument or in a schedule attached thereto.

For a statement of the claim made by the complainants, and of the chain of title of the respective parties, reference is made to our former opinion.

It appears from the testimony that at the time of the assignment Robinson was considerably indebted to different persons, and was unable to pay them, and executed an assignment purporting to be for the benefit of all his creditors, with certain preferences, hereinafter more particularly referred to. The contest here is not between creditors claiming any benefit under the deed seeking to enforce an execution of the trust, but complainants claim through a creditor acting in defiance of the title of the trustees. The defendant is not a creditor, and does not claim title through the trustees in the execution of their trust.

The bill charges that the deed of assignment was executed to hinder, delay, and defraud creditors. Patent proof of such intention is shown by the fact that the assignees never took any steps to enforce the trust, never

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took possession or control of the property, never sold it in execution of the trust, and never paid a creditor of the assignor. The creditor under whom the complainants claim title, instead of acquiescing in or recognizing the validity of the assignment, proceeded to judgment, and levied execution upon the lands as the property of Dennis Robinson. The property was sold under such execution levy, the sheriff's deed executed, and it has passed though successive purchasers; and for more than 29 years this action has remained unchallenged by either party to the assignment, or by any creditor of Robinson. The testimony shows conclusively that the assignment was a mere formality, executed with the intention of defrauding, delaying, and defeating creditors of Dennis Robinson. Two, at least, of the assignees asserted as early as 1859 that they had never accepted the assignment, and had never done anything under it, and never should; and Dennis Robinson himself directed the assignee of the judgment, who obtained the title under the sheriff's sale, to convey the title which he so obtained to a parcel of the land to a Mr. Ryan, in payment of a debt due from Robinson to Ryan.

The assignment refers to a schedule of creditors who were preferred in the instrument. No schedule of creditors accompanies the instrument, and it does not appear that any was ever prepared or furnished to the assignees. It was an imperfect instrument when delivered, and two of the grantees named in it stated that they had never accepted it; and if it can be said that they did in fact accept the instrument in writing by signing their names to the instrument as recorded, still it cannot be said that they ever accepted a complete assignment.

The assignment contains this clause:

"They shall apply the surplus or residue of said trust moneys in and towards the payment and satisfaction of

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the several debts and sums of money due to the persons or creditors named in the schedule marked 'A,' as aforesaid, and enumerated in and under class number one, and so marked and indicated, and they in the successive order in which they relatively stand in said class, to wit, after full payment and satisfaction of the debts due the first, then the residue, if any there be, to be applied to the payment of the second, and then in succession to the third, and that thus successively the whole may be paid as far as the property and effects hereby assigned as aforesaid may or shall be sufficient to pay the same; and, after payment and satisfaction of such last above referred to debts and creditors mentioned in class number one, so marked in said schedule, and of all such costs, charges, and expenses aforesaid, then in trust, that they, or the survivor of them, his executors or administrators, do and shall apply the surplus or residue of said trust moneys in and towards payment and satisfaction of the several debts and sums of money due to the persons or creditors named in said schedule marked 'A,' as aforesaid, and enumerated in and under said class number two, so marked and indicated in said schedule, to them *pari passu*, and without any preference or priority of payment in reference to the order or succession in which they stand in said class."

While it will not invalidate an assignment which professes to convey all the assignor's property, and refers therein to a schedule of such property to be annexed, if such schedule is not annexed at the time of the execution of the assignment, yet I have not met with any authority which holds an assignment valid as against non-consenting creditors, where the assignor prefers certain creditors over others, unless such creditors are specified in the assignment itself, or embraced in a schedule annexed at the time the instrument was executed. The reason is obvious. It cannot be left to the debtor or to the assignees to say what creditors shall be preferred after the assignment is executed. This would leave the door open to the grossest frauds and favoritism. The debtor might sell his favors at a premium, and the assignees

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would not know at the time they accepted the trust whom they were to pay in preference to other creditors of the debtor. Thus, in *Averill v. Loucks*, 6 Barb. 470:

"Where an assignment directed the assignees to pay the debts specified in the schedules annexed thereto according to the priority of the several schedules, and provided that such schedules should be made within 60 days, and be annexed to and form a part of the assignment, but did not prescribe what debts should be inserted in the respective schedules, or in what order they should be arranged therein, the preparation of such schedules being left entirely to the discretion of the assignors, and it appeared that such schedules had not been made out and annexed to the assignment previous to its execution, but that they were prepared by the assignors and annexed at some subsequent time, held, that the assignment was fraudulent and void."

And Mr. Burrill, in his work on Assignments, § 153, says:

"Where a preference is intended to be indicated by a schedule, it must be distinctly shown by some separation of the debt intended to be preferred from the other debts specified. The mere placing of a debt at the head of a schedule is not sufficient. And where an assignment refers to one or more schedules as fixing the order in which certain preferred creditors shall be paid, it is essential that they should be annexed to the assignment previous to its execution, unless the assignment itself prescribe what debts shall be inserted in them, and in what order."

And he cites, in support of what has been quoted, *Winslow v. Assignees of Ancrum*, 1 McCord, Eq. 100, and *Averill v. Loucks*, 6 Barb. 470. See, also, *Barnum v. Hempstead*, 7 Paige, 571; *Boardman v. Halliday*, 10 Id. 227; *Sheldon v. Dodge*, 4 Denio, 221; *Hyslop v. Clarke*, 14 Johns. 462; *Kercheis v. Schloss*, 49 How. Pr. 284.

It is urged by defendant's solicitor that the complainants are too late in seeking relief against the alleged fraudulent and invalid conveyance; that, under the decis-

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ions of this Court, the judgment creditor through whom complainants claim should have filed his bill in aid of his execution before sale; and in support of this position he cites the following: *Messmore v. Huggard*, 46 Mich. 558; *Cranson v. Smith*, 47 Id. 189; *Jenison v. Rankin*, 57 Id. 49; *Munson v. Ellis*, 58 Id. 335; *Edsell v. Nevins*, 80 Id. 146. If those cases were applicable to the present, I should be loth to follow them where to do so would be to inflict palpable injustice upon the parties who have obtained rights relying upon the decisions and intimations of this Court in its reported cases. In *Cleland v. Taylor*, 3 Mich. 201, the action was ejectment, and the plaintiff relied upon the sheriff's deed, made upon a levy upon land which the plaintiff claimed had been conveyed by defendant with intent to defraud his creditors, and the question raised and decided was that the plaintiff could introduce evidence tending to show that the conveyance was executed with intent to hinder, delay, and defraud the creditors of the defendant in the execution. The presiding judge, at page 206 of the opinion, said:

"It is said that a conveyance intended to defraud creditors is not void, but voidable only at the instance of such creditor. In some respects this is so. As between the parties to the deed it conveys the legal title, which is good also as against the creditor until he pursues his remedy *as such creditor*, and acquires a lien upon or an interest in the land. When he has done this, the deed is void as to him, and may be treated by him in the prosecution of his remedies as creditor as absolutely void in law as well as in equity. The statute makes no distinction;" citing the Revised Statutes, p. 328.

And in *Trask v. Green*, 9 Mich. 368, Mr. Justice CHRISTIANCY says:

"Where the title before the conveyance has been vested in the debtor himself, and he has conveyed for the purpose of defrauding his creditors, the right of creditors to

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levy and sell rests upon the ground that, the deed being void as to creditors, the legal title, as to them, still remains in the debtor, as if no conveyance had been made. The land may therefore be sold on execution at law, without invoking the aid of a court of equity; and the purchaser may, if he chooses, try the question of fraud in an action at law (*Cleland v. Taylor*, 3 Mich. 201, and cases cited); and he may, doubtless, file his bill in a proper case, after sale, to remove the cloud created by the fraudulent conveyance. But it is generally more advantageous to all parties, and therefore more common, for the creditor to bring his bill before sale, in aid of the execution. And this may be done at any time after the creditor has obtained a lien upon the land by his judgment, when that of itself creates the lien, or only after the levy of an execution, where, as in this State, the levy is necessary to give the lien."

It is true that what was thus said by Mr. Justice CHRISTIANCY was only the reasoning of the Court, but all of the Justices of the Court concurred in this reasoning, Mr. Justice CAMPBELL so expressly stating. These decisions were not questioned until the case of *Messmore v. Huggard*, 46 Mich. 558. In that case it was claimed that the mortgage had been executed by the judgment debtor before the levy of execution, which mortgage, it was claimed, was fraudulent and void as to the judgment creditor, and after sale he filed a bill to have the mortgage set aside and discharged as a cloud upon his title. The defendant claimed that the bill should have been filed before sale in aid of execution; and Mr. Justice COOLEY, at page 561, said:

"The point has never before been distinctly presented in this State, though since the decision in *Cleland v. Taylor*, 3 Mich. 202, it has perhaps been assumed that the right to question the *bona fides* of any conveyance by the judgment debtor was as much available to the creditor after he had caused the land to be sold on execution and become the purchaser as it was before. In that case the debtor had made an absolute conveyance, and the creditor,

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without proceeding to have the conveyance set aside, had become purchaser at the execution sale, and then brought ejectment. The defendant in ejectment questioned the right to inquire into the fraud in a court of law for the purpose of avoiding the deed; but the Court, citing and relying upon *Jackson v. Myers*, 18 Johns. 425; *Jackson v. Parker*, 9 Cow. 73; *Jackson v. Timmerman*, 7 Wend. 436, 12 Wend. 299; and *Stephens v. Sinclair*, 1 Hill, 143,—decided that it was as competent to set aside the fraudulent deed by suit at law as by bill in equity, and that ejectment by the purchaser at the execution sale was a suitable proceeding for the purpose. There are numerous decisions in other states to the same effect, and we do not question their authority. But the case of *Cleland v. Taylor*, and the others referred to, have little analogy to this. In those cases the judgment debtor had conveyed away his whole interest, and any offer to sell on an execution against him necessarily attacked his conveyance. The judgment debtor would understand this, and his grantee would understand it and take his measures accordingly. So would all persons who should be inclined to become bidders at the sale understand it, and all would stand on an equality with the judgment creditor in making bids. No doubt it would be proper for the sheriff expressly to give notice at the sale that the validity of the debtor's conveyance was disputed; but, as the offer to sell would be idle and meaningless if the conveyance was not contested, any such notice would obviously be unimportant. In this case the situation was altogether different. The judgment debtor had only mortgaged his lands, and an interest remained in him which was subject to execution sale without questioning the mortgage."

It is thus seen that *Messmore v. Huggard* does not overrule *Cleland v. Taylor*.

In *Cranson v. Smith*, 47 Mich. 189, the bill was filed in aid of execution by a purchaser at the execution sale. The execution debtor had, prior to the levy, executed a quitclaim deed of the premises to his wife, which the complainant alleged was done with the intent to cheat, delay, and defraud his creditors. It was held that the bill in aid of execution must be filed before sale, and could not be afterwards. Mr. Chief Justice MARSTON

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distinguishes the case from *Cleland v. Taylor* and *Trask v. Green*. It will furthermore be perceived that this case originated since the amendment to the statute in 1867,[1] by which the practice is regulated. In *Jenison v. Rankin*, 57 Mich. 49, the Court pointed out the distinction which the amendment to the statute made in the remedies to be pursued, and called attention to the fact that *Cleland v. Taylor* was decided under the Revised Statutes of 1846, and that since the amendment the parties must pursue the remedy provided by the amendment; and this was again announced in *Edsell v. Nevins*, 80 Mich. 146.

The levy and sale were made in this case under the statute authorizing a levy of execution on lands fraudulently conveyed, as such statute read before amended in 1867, and as it read when the cases of *Cleland v. Taylor* and *Trask v. Green* were decided; and so we may say that, if the deed of assignment was valid upon its face, the creditor at that time might attack it by a levy and sale upon the real property as the property of the debtor, and, as pointed out by Mr. Justice COOLEY in *Messmore v. Huggard*, the judgment debtor had conveyed away his whole interest, and any offer to sell on execution necessarily attacked his conveyance. It has never been decided in this State, in cases which arose previous to the amendment of the statute in 1867, that an execution purchaser cannot attack a conveyance made in fraud of creditors, either in an action of ejectment or by bill in equity to remove a cloud upon the title.

In this case the defendant is not in a position to appeal to the conscience of a court of equity in his behalf. After the lapse of more than 25 years, through some one's instigation, the trustees in the deed of assignment, without having attempted to execute the trust, reconveyed in consideration of one dollar the land described in

[1] Act No. 95, Laws of 1867 (How. Stat. § 6108).

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Schedule B to Dennis Robinson, the debtor who executed the assignment. In this they merely attempted to discharge themselves of the trust, not to execute it. Robinson obtained no right, title, or equity superior to the purchaser at the execution sale against him. Utley was both prior in time and prior in right. Robinson could not successfully contend against the title of the execution purchaser, and O'Conner stands in no better situation than Robinson.

I do not consider it necessary to place the decision of this case upon the ground simply that the assignment was executed for the purpose of cheating, delaying, and defrauding creditors, although I think it might safely be rested there, but I place it also upon the ground that the conveyance is void upon its face, and conveyed no title whatever to the grantees, for the reason that it did not contain the names of the creditors preferred, either in the body of the instrument or in the schedule annexed at the time of its execution.

If the instrument were a valid one, the defendant in the original and complainant in the cross-bill would not be entitled to the relief here prayed. If there was a trust which had not been executed by the trustees, he would become trustee by the transfers under which he claims title, and his title would be subject to the execution of the trust in equity, and he could not be allowed relief without paying the debts for which the assignment was executed; but it is not necessary to consider this branch of the case, as the other is a sufficient answer to his claims for relief, and it follows that the decree of the court below should be affirmed.

The other Justices concurred.

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WILLIAM F. SEELY v. WILLIAM O'CONNER, AND HENRY O. BEVIER v. WILLIAM O'CONNER.

[Two cases.]

Bill to quiet title.

These cases are ruled by *Wolf v. O'Conner, ante*, 124.

Rehearings, upon application of complainants, of cases reported in 83 Mich. 310. Submitted January 8, 1891. Decrees affirmed October 30, 1891.

G. A. Wolf (*E. F. Uhl*, of counsel), for complainants.

Russell C. Ostrander, for defendant.

CHAMPLIN, C. J. In these causes the decrees of the court below will be affirmed, for the reasons stated in the opinion upon rehearing in *Wolf v. O'Conner*, 88 Mich. 124.

The other Justices concurred.

WILLIAM BOYDEN AND CLARISSA BOYDEN v. WILLIAM N. MCROBERTS, DAVID S. MCROBERTS, AND MARY M. CLARK.

Deed—Agreement for life-support—Bill to set aside conveyance—Decree.

An aged father conveyed a life-estate in his farm to his son, in consideration of $1 and the payment by the son to his sister of

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$100. The son gave his father a life-lease, coupled with an agreement to furnish him a life-support. The father then conveyed the fee of the land to his grandson, subject to his son's life-estate. After living with his son for a few months under this arrangement, the father left, by reason, as he claims, of cruel treatment and non-support, and conveyed the land to other parties, in consideration of their agreement to support him during his natural life, and soon afterwards joined with them in a bill to set aside the former deeds, but died before the hearing of the cause. And it is held that the father was justified in leaving his son's house, and in declaring the contract for support forfeited; and a decree is ordered to be entered in favor of the second grantees for the amount expended by them in the support of the father, which sum is to be a first lien upon the land, and may be paid by the son or daughter or grandson within 90 days, and, in default, the second grantees may sell the land upon like notice as in foreclosure cases.

Appeal from Clinton. (Daboll, J.) Argued October 9, 1891. Decided October 30, 1891.

Bill to remove cloud from title. Complainants and defendant William N. McRoberts appeal. Decree reversed, and one entered in this Court for complainants. The facts are stated in the opinion.

Davis & Nichols, for complainants.

Spaulding & Walbridge, for defendants McRoberts.

Charles M. Merrill, for defendant Clark.

LONG, J. This bill is filed to set aside two deeds made by one James McRoberts.

The deeds were made on the 17th day of October, 1887, one to William N. McRoberts and the other to David S. McRoberts, two of the defendants in this suit. The deed to William N. McRoberts conveyed a life-interest in the premises described, the consideration named being one dollar, and a condition that William N. pay to his sister, Mary M. Clark, the other defendant, the sum of $100

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within five years from the date thereof. The other deed conveyed to David S. the title in fee to the premises, subject to the life-estate of William N.

At the time of the execution and delivery of these deeds, William N. made and delivered to James McRoberts a lease of the premises for the term of his natural life, and which lease also provided that William N. should care for and maintain James during his life, furnish him food and clothing, care and nursing in sickness, medical attendance, and pay his funeral expenses at his decease. He was to live in the family of William N. James McRoberts was then about 83 years of age. He was the father of William N. McRoberts, and the grandfather of David S. McRoberts, a son of William N. McRoberts, and an infant under 21 years of age.

It appears that the parties lived together from that time until about April 1, 1888, when it is claimed by the bill that William N. wholly failed, neglected, and refused to carry out and perform his agreement to support, provide for, and maintain his father, who left the home of William, and went to reside with complainants. On April 19, 1888, James McRoberts made, executed, and delivered to the complainants a warranty deed of the same premises, being the N. W. fractional ¼ of the N. E. ¼ of section 4, town 7 N., of range 4 W., Clinton county, Mich., containing 40.46 acres of land. The consideration expressed in this deed is $1,000. The real consideration, however, is the bond executed by the complainants, reciting the giving of the deed to them, and an agreement upon their part to furnish James McRoberts, during his natural life,—

"A good and comfortable home in their family, with necessary and suitable food, clothing, and necessaries of life, care for, nurse, and furnish necessary medical attendance when sick, and at his death to pay all funeral

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expenses necessary to give his body a good and decent burial."

At the time the bill was filed in the cause, July 10, 1888, James McRoberts was living, and was one of the complainants in the bill; and after the cause was at issue his testimony was taken before the time of hearing of the cause, under the statute giving the parties the right to take the same, by reason of his extreme age and infirmity, that the same might be perpetuated to be used upon the hearing. Before the hearing of the case, and on July 17, 1889, and while living with the complainants, James McRoberts departed this life. His death was suggested of record, and an order entered in court that the cause survive and proceed in the name of the other complainants.

On the hearing in the court below, the testimony being taken in open court, a decree was entered finding that William N. had not complied with the terms and conditions of his agreement with James, and that James was justified in leaving the premises of William by reason of the failure of William to comply with the terms and conditions of the lease. It was further found that William and Clarissa Boyden, the surviving complainants, having faithfully performed the terms and conditions of the bond by them given to James in consideration for the deed to them, were entitled to recover the sum of $320 from William N., and it was ordered that William N. pay the same within 60 days after the service of a copy of decree, and that, in default of such payment, the deed from James to William be set aside and held void, and, further, that the deed to the complainants from James be declared valid, with the right of possession thereunder of the premises. The court further decreed that the deed to David S. McRoberts be declared valid and of full force and effect, but subject to the terms

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and conditions therein mentioned; and that Mary M. Clark, the other defendant, have a lien upon the premises for the sum of $100, subject to the deed of the complainants and the sum due them under the decree. It was further provided in the decree that, in case of default of the payment of the sum of $320, and the costs of the suit, complainants might, in lieu of taking possession of the premises, sell the interest of William N. therein, and give to the purchaser thereof a good and sufficient deed of conveyance.

The only condition mentioned in the deed from James to his grandson, David S., is that the title given is subject to the life-estate of William N., and not to take effect until the death of William.

From this decree complainants and defendant William N. McRoberts appeal.

It would profit no one to set out the testimony taken upon the hearing in the court below. It appears that when these three papers were drawn—that is, the deeds from James to William N. and David S., and the agreement from William to James—they were left in the hands of an attorney, to be delivered to the parties when William paid for the drawing of them, when the attorney was to see that the deed to David S. was recorded; that, prior to the delivery of the deeds, James notified the attorney not to deliver them; and that shortly thereafter Mr. Boyden, one of the complainants, also notified the attorney not to deliver them, and they were not delivered until after the time the deed was made to complainants, after which they were delivered to William N. McRoberts, and recorded.

We think the testimony abundantly shows that James was justified in leaving the premises and declaring the contract forfeited. These three papers must be construed together; that is, the two deeds and the agreement on

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the part of William N. to care for his father. The treatment he received at the hands of his son William appears to have been cruel in the extreme. The deeds were made on October 17, 1887, and he left William's house the 1st of the next April, and at once declared the contract at an end, and notified the party who held the papers not to deliver them. If the testimony of James is true, he was assaulted and bruised by his son, and it is evident that William did not give his father that care and attention which was contemplated by the contract, or which should have been inspired by his filial affection for a father, who was old and decrepit. It is only one of the many cases that come before us where aged people have given all their earthly possessions to some one of their children in the mistaken belief that they would have better care during their remaining years than by retaining their property themselves.

These deeds to William N. and David S. McRoberts had not been delivered at the time the deed was made to the complainants in this case, and it appears that the complainants gave to James that care and attention which his extreme old age and infirmities required. During the last few months of his life, James was a great burden to the complainants, requiring constant care and attendance, and his infirmities were such that he was as helpless as an infant. For this care James intended that the complainants should have the property. The court below gave them a sum of money which it regarded as a sufficient recompense for all their care; but the difficulty in carrying out the decree of the court below is that the premises are not of sufficient value to realize the amount of the complainants' recovery from a sale of William N.'s interest. The premises are said to be worth from $800 to $1,000, being 40 acres of land, only partially improved.

The defendant David S. appeared by his guardian *ad*

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litem, and it is insisted that his interest in the premises should not be disturbed. We do not feel inclined to set aside the two deeds to William N. and David absolutely, but we think the amount of complainants' recovery none too large, and the provision for complainants' recovery made by the court below too precarious and uncertain.

The decree of the court below must be set aside, and a decree entered in this Court in favor of the complainants for the amount found by the court below, with costs of both courts, which amount shall be a lien upon the premises in question prior to that of William N. and David S. McRoberts and Mary M. Clark, or either of them. They, or either of them, may pay the amount of complainants' claim within 90 days from the entry of said decree; and, in default thereof, the complainants may proceed to sell the premises, giving like notice as in case of foreclosure of mortgage.

The other Justices concurred.

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WILLIAM STIMER v. HARRY ALLEN.

Replevin—Bond—Judgment for return—Liability of surety.

A surety in a replevin bond, who acted as agent for the plaintiff in the issuance of the writ by the justice, and in the seizure of the property, which was delivered to the plaintiff, cannot escape liability in a suit on the bond for a failure to return the property pursuant to a judgment for such return by showing that no affidavit was filed with the justice before the writ was issued. *Jennison v. Haire*, 29 Mich. 207.

Error to Jackson. (Peck, J.) Argued October 8, 1891. Decided October 30, 1891.

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Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Michael Kenny (*A. E. Hewett,* of counsel), for appellant.

Dwight D. Root, for plaintiff.

LONG, J. This action was commenced in the Jackson circuit court on a replevin bond, where plaintiff had judgment under the direction of the court for the sum of $147. Defendant brings error. The bond was given in a replevin suit which was commenced before a justice of the peace, and is in the usual form of replevin bonds.

The defendant pleaded the general issue, and gave notice—

1. That the bond was not signed until the return-day of the writ of replevin.
2. That there was no affidavit filed with the justice before the writ of replevin was issued.
3. That the justice for this reason had no jurisdiction to issue the writ, and therefore the bond was void.

Upon the trial of the case in the circuit court, it appeared, and without contradiction, that the bond was signed by the defendant before the writ of replevin was issued. It was a matter in dispute, however, upon the trial, whether any affidavit in replevin was made before the issue of the writ.

The history of the replevin suit before the justice is that on August 1, 1888, Allen, the defendant, went before Albert M. James, a justice of the peace, and, acting as the attorney and agent for one Nicholas Kress, caused a writ of replevin to be issued in favor of said Kress against Stimer, the plaintiff in this suit. The bond upon which this action is brought was signed by Allen that day as surety for Kress, the plaintiff in that suit. Kress was not present before the justice. The justice testified

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in the present case that he drew the affidavit for the writ in Kress' name, which was signed by Allen for Kress. This, however, is denied by Allen. On the return-day of the writ before the justice, Kress and Allen were present, and Kress then signed the bond. The surety did not justify his responsibility. Stimer, the plaintiff in this suit and the defendant in the replevin suit, appeared specially before the justice, and moved to quash the proceedings for want of jurisdiction, upon the ground, among others, that no bond was given before the issuing of the writ. These objections were overruled, and the plaintiff had judgment.

The writ of replevin had been served by an officer, and the property described in the writ, a stack of wheat and a stack of rye, replevied and turned over to the plaintiff in the writ. The defendant in that suit, after the rendition of the judgment, filed his affidavit and bond for a general and special appeal to the circuit court. The appeal came on to be heard in the circuit court, and the plaintiff in the writ, Mr. Kress, by his attorney admitted that the allegations were well taken; whereupon the circuit court reversed the judgment of the court below, and entered judgment for the defendant in the writ for a return of the property. The property was not returned, and this action was commenced upon the bond.

The case as presented by defendant's counsel is that, although the defendant, acting as the agent and attorney for Kress in the replevin suit, took the property, or caused it to be taken, and delivered over to Kress, and for that purpose signed the bond in controversy, Kress may still hold the property, and he, as surety on the bond, escape all liability. Treating the writ of replevin as void by reason of no sufficient affidavit having been filed and no sufficient bond given, yet the justice had jurisdiction upon the return-day of the writ to order

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return of the property, and, upon failure of the plaintiff in the writ so to return it, an action upon the bond could be maintained.

The bond given in this case was one of the instrumentalities by which the plaintiff in the suit was enabled to obtain possession of the property. Allen, the defendant in the present suit, was an active agent in procuring the writ to be issued and the property taken, and he is surety in the bond. The express condition of the bond is that, if the defendant recovers judgment against the plaintiff in the replevin suit, he will return the property described in the writ, if return thereof be adjudged. This condition in the bond has not been kept and performed. It is for a breach of this that the action is brought. The defendant in the writ had judgment in his favor in the circuit court for a return of the property, and the court in the present action was not in error in directing a verdict in favor of the plaintiff.

In *Jennison v. Haire*, 29 Mich. 207, 214, it was said by the Court:

"The proceedings in the replevin suit, including the bond in question, constituted the machinery by which the property was taken, * * * and the parties who promoted and managed those proceedings cannot set up that they got the property without an affidavit, or committed other similar irregularities, in order now to defeat a suit on the bond."

We find no error in the record, and the judgment will be affirmed, with costs.

The other Justices concurred.

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MARY DOHM v. MALCOLM B. HASKIN AND ELEANOR HASKIN.

Mortgage foreclosure—Assignment—Recording laws—Tenancy in common—Chattel mortgage.

1. An assignment of mortgage executed in Kansas, and acknowledged before a notary public, is not entitled to record in Michigan unless the official character of the notary and the genuineness of his signature, and the fact that the assignment is executed and acknowledged according to the laws of Kansas, are certified to by the clerk or other proper certifying officer of a court of record, as required by How. Stat. § 5660;[1] citing *Buell v. Irwin*, 24 Mich. 145; *Reynolds v. McMullen*, 55 Id. 577; *Miller v. Clark*, 56 Id. 340.

[1] How. Stat. § 5659, provides that a deed executed in any other state, territory, or district of the United States may be executed according to its laws, and that such execution may be acknowledged before any judge of a court of record, notary public, justice of the peace, master in chancery, or other officer authorized by the laws of such state, territory, or district to take the acknowledgment of deeds therein, or before any commissioner appointed by the Governor of this State for such purpose.

How. Stat. § 5660, prior to the amendment of 1891, provided that in cases specified in section 5659, unless the deed was acknowledged before a commissioner of deeds for Michigan, it should be authenticated by the certificate of the clerk or other proper certifying officer of a court of record of the county or district, or of the secretary of state of the state or territory, within which the acknowledgment was taken, under the seal of his office, showing that the acknowledging officer was at the date of the certificate of acknowledgment such officer as he was therein represented to be, and that the certifying officer believed the signature of such acknowledging officer to be genuine, and that the deed was executed and acknowledged according to the laws of such state, territory, or district. This section was amended by Act No. 112, Laws of 1891, which provides that deeds acknowledged before a judge of a court of record under the seal of said court, or before a notary public who certifies to such acknowledgment under his official seal, may be recorded without having attached thereto the certificate hereinbefore mentioned. The amendment further provides that "whenever any deed, or other instrument affecting the title to land, executed, acknowledged, and authenticated in accordance with this section and the last preceding section, has been heretofore recorded in the proper county, such record, or a certified transcript thereof, shall be *prima facie* evidence of the due execution of such instrument, to the same extent as if it had been authenticated as required by the statute in force at the time such instrument was recorded."

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2. Where, after an agreement between a mortgagor and mortgagee that a chattel mortgage on machinery in a flouring-mill shall be ignored and canceled, and the mortgaged property treated as a part of the realty (which was covered by a real-estate mortgage given at the same time as the chattel mortgage, and securing the same debt), the mortgagee sells the machinery under the chattel mortgage, such sale is void.
3. A foreclosure by advertisement by an assignee of a mortgage, the assignment of which was executed in another state, and not so certified as to entitle it to be recorded in this State, although recorded therein, is void.
4. Equity will not permit one tenant in common, in the possession of property, for the use of which he is bound to account to his co-owner, to foreclose by separate advertisements three mortgages which he holds upon his co-tenant's interest, all of which are past due.

Appeal from Berrien. (O'Hara, J.) Argued October 13 and 14, 1891. Decided October 30, 1891.

Bill to set aside the foreclosure of certain mortgages. Complainant appeals. Decree reversed, and case remanded for further proceedings in accordance with the opinion, in which the facts are stated.

Edward Bacon, for complainant.

George M. Valentine and *George S. Clapp*, for defendants.

GRANT, J. In 1874, Almerian and Malcolm B. Haskin became the owners as tenants in common of a flouring-mill, the property in dispute in this case. August 29, 1885, Almerian sold and deeded his half interest to George E. Hotchkin, who executed a mortgage to him for the full purchase price. Hotchkin and Malcolm Haskin carried on the business as copartners until September, 1888, when Hotchkin conveyed his undivided interest to complainant, and the partnership was dissolved. Malcolm then leased complainant's interest for a year for $300.

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Soon after the organization of the partnership between Hotchkin and Malcolm, it was considered necessary, in order to insure success, to put in the "roller process" machinery. Hotchkin had no means, and it was agreed that Malcolm should furnish the money, and that Hotchkin should give him a mortgage on his half interest to secure the payment. Half of the expense amounted to $1,325. June 22, 1885, Hotchkin executed a mortgage for this amount on his interest in the mill property, and also executed a chattel mortgage for the same debt on the machinery. On October 3, 1888, Malcolm commenced the foreclosure of this mortgage by advertisement. The sale took place December 31, Malcolm bidding the property in for $1,106.08, and the deed was recorded January 9, 1889. Two bidders only were present at the sale, Malcolm and complainant, through her husband, who was acting as her agent. Malcolm then gave notice of this chattel mortgage, which he had filed December 12, and of his intention to foreclose it as against any purchaser at that sale. Complainant and her agent both knew that this chattel mortgage was for the same debt as the other mortgage. Meanwhile Malcolm procured an assignment of the mortgage given by Hotchkin to Almerian, and on February 6, 1889, commenced a foreclosure by advertisement, the amount due being between $1,100 and $1,200, exclusive of interest. The sale took place May 7, 1889, for the sum of $1,312.73, and the sheriff's deed thereupon was duly executed and recorded. May 13, 1889, Malcolm posted notices of sale under his chattel mortgage. Complainant served upon him a written protest, but the sale proceeded, Malcolm bidding the property in for the sum of $300.

The mortgage given by Hotchkin to Almerian was recorded subsequently to the mortgage given to Malcolm.

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The assignment of this mortgage to Malcolm was executed in Kansas. It has but one witness, and purports to be acknowledged before a notary public. No certificate of a clerk or other proper certifying officer of a court of record was attached as required by the statute. How. Stat. § 5660. It was therefore not entitled to record, and the register of deeds should have refused to record it. *Buell v. Irwin*, 24 Mich. 145; *Miller v. Clark*, 56 Id. 340; *Reynolds v. McMullen*, 55 Id. 577.

It was mutually agreed between Hotchkin and Malcolm on September 26, 1885, that said chattel mortgage should be ignored and canceled, and the property therein mentioned treated as a part of the realty. Under this state of facts, the sale under the chattel mortgage was void.

So, also, was the foreclosure sale under the mortgage given to Almerian Haskin, for the reason that the assignment was not entitled to record. The right to foreclose by advertisement is conferred solely by the statute, and its provisions must be strictly complied with. Under this statute, the mortgage and assignment must not only be recorded, but they must be executed in such a manner as to entitle them to record. See the authorities above cited.

I think the proper forum in which the defendant Malcolm Haskin should have proceeded to foreclose his mortgages was in equity, where all the rights of the parties could have been equitably determined and protected. Equity will not permit one tenant in common, in the possession of property, for the use of which he is bound to account to his co-owner, to foreclose by separate advertisements three mortgages which he holds upon his co-tenant's interest, all of which are past due. While it is true that complainant knew that the chattel mortgage covered the same debt as the real-estate mortgage, yet the insistence at the sale of the validity of the chattel

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mortgage, and the threat to foreclose it, might well deter her, or her agent, from bidding at the sale. This was evidently what Malcolm intended, and his object was accomplished. I think all these sales were void, and should be set aside.

The decree of the court below must be reversed, and the case remanded for further proceedings. The property is so situated that it cannot be partitioned, and must therefore be sold, and the proceeds divided. Out of the complainant's share must be deducted the amounts due defendant Malcolm under his mortgages. Complainant will recover the costs of this Court.

The other Justices concurred.

G. Francis Topliff and Charles B. Brooks v. Edward J. McKendree.

Contract by correspondence—Incomplete negotiations.

The letters and telegrams set forth in the opinion are held not to have made a completed contract for the sale by defendant to plaintiffs of 100 shares of mining stock, the manner and place of delivery being left open for future negotiation between the parties.

Error to Wayne. (Hosmer, J.) Argued October 14, 1891. Decided October 30, 1891.

Assumpsit. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

Bowen, Douglas & Whiting, for appellants, cited no authorities.

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Conely, Maybury & Lucking, for defendant, contended:

1. Inasmuch as the place of delivery was a material part of the proposed sale, and inasmuch as this was never agreed on, there was no completed contract; citing *Van Valkenburg v. Rogers*, 18 Mich. 180; *Johnson v. Stephenson*, 26 Id. 63; *Ahearn v. Ayres*, 38 Id. 692; *Eggleston v. Wagner*, 46 Id. 610, 620; *McDonald v. Bewick*, 51 Id. 79; *Thomas v. Greenwood*, 69 Id. 215; *Whiteford v. Hitchcock*, 74 Id. 208, 211; *Lumber Co. v. Crosby*, Id. 313, 317; *Bowen v. McCarthy*, 85 Id. 26.

GRANT, J. Plaintiffs and defendant were stock-brokers, the former in Boston, the latter in Detroit. November 30, 1885, defendant wrote plaintiffs, in which, among other things, he said:

"Lake Superior Iron Mining Co. stock can be bought here at about 40 to 41 per share. If you can do anything at those figures, I can furnish some of the stock, say 100 to 200 shares."

Some correspondence in regard to this and other matters, by letters and telegrams, followed, but which have no bearing upon the question at issue. December 3, defendant wrote plaintiffs, stating:

"I can furnish you 100 shares Lake Superior at $41.00 per share, but with little or no profit to myself. Still, I will furnish you with the stock if you order it. Can ship it to you, I guess, with draft attached."

This letter was received the morning of December 5, and plaintiffs immediately replied as follows:

"Your favor of the 3d is at hand, in which you offer us 100 shares Lake Superior Iron M. Co. at 41. * * * Our customers are slow in buying the stock. We had a favorable offer for 25 shares to-day, but did not dare to sell, as we inferred from your letter that you did not care to break the lot. If you can sell us any part of 100 shares, say 25, 50, or 75 shares, at 41, please wire us early Monday A. M., as our buyer may withdraw his bid. We hope to dispose of the whole lot early next

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week. State length of time at which your offer of the stock is good."

December 7, two days after the receipt of the above letter, plaintiffs telegraphed defendant as follows:

"We take 100 Lake Superior, 41. Forward, draft attached."

On the same day they wrote defendant, saying:

"We wired you this A. M. as follows: 'We take 100 Lake Superior, 41. Forward, draft attached,'—which we now confirm. We expect the stock Wednesday or Thursday."

Receiving no reply from defendant, plaintiffs, on December 9, telegraphed defendant:

"No stock, letter, telegram from you. What does it mean? Explain at once by wire."

To this telegram defendant replied by letter December 11, saying:

"Much to my regret, I am unable as yet to furnish that 100 shares of Lake Superior stock."

He also stated his reasons for not furnishing it, and further stated that there was no doubt but that he could get it, as it had got to be sold, and expressed the hope that the matter would not put them to too great inconvenience.

I do not think this correspondence made a completed contract. The defendant did not bind himself to send the stock to Boston, nor did the plaintiffs bind themselves to accept it and pay for it in Detroit. No binding and completed contract could have been made otherwise than by the acceptance on the part of the defendant of the terms of the telegram of December 7. *McDonald v. Bewick*, 51 Mich. 79; *Eggleston v. Wagner*, 46 Id. 610; *Bowen v. McCarthy*, 85 Id. 26.

The statement, "I guess I can ship it to you with

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draft attached," cannot be construed into an absolute offer to ship it. The manner and place of delivery were left open for future negotiation between the parties. Plaintiffs' letter of December 5, and their own evidence upon the trial, show that they must have so understood it. On December 7 they had negotiated a verbal sale of the stock, but refused to complete it until defendant had confirmed their offer by telegram. Getting no reply from defendant by 3 o'clock P. M., they told their customer that they would sell him the stock.

The letter of defendant of December 11 was not an acceptance of the plaintiffs' offer contained in their telegram of December 7. That letter stated that he was unable to furnish the stock. The defendant did not then have the stock under his control. The owner was in New York, and the stock was in a Detroit bank as security. The owner refused to release it until he returned. All these facts were communicated by defendant to plaintiffs in his letter of December 11. The statement that "there is no doubt about getting the stock" constituted no binding agreement on his part to procure it, and there is nothing else in the letter from which any contract could be implied.

The court below properly directed a verdict for defendant.

Judgment affirmed.

The other Justices concurred.

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In re Estate of Israel J. Beniteau, Deceased. Ame P. T. Beniteau v. William R. Dodsley, Administrator.

Estates of deceased persons—Sale of lands for payment of debts—Limitation of time.

1. An administrator *de bonis non*, appointed on the removal of the original administrator and sole heir of the deceased for refusing to pay a claim of $1,081 allowed against the estate, obtained a license to sell real estate upon a petition alleging that it was necessary to make such sale to raise the sum of $1,200, or thereabouts, to pay the just debts and charges against the estate, and that no personal estate of the deceased had come into his hands, which allegations were supported by the proofs taken on the hearing. And it is held that the petition and proofs fully met the requirements of the statute authorizing such license and sale when the personal estate in the hands of an executor or administrator is insufficient to pay all of the debts of the deceased, and the charges of administration.
2. The license to sell was granted within four years and six months from the appointment of the original administrator, but more than that period would elapse before a sale could be made thereunder, and it was objected by the heir that the probate court lost jurisdiction to grant the license at the end of four years from such appointment, under the ruling in *Hoffman v. Beard*, 32 Mich. 218; which case the Court hold does not apply to the one at bar, and that under the circumstances the heir cannot be heard to raise the objection.

Error to Wayne. (Reilly, J.) Submitted on briefs October 15, 1891. Decided October 30, 1891.

Appeal from order of circuit court affirming order of probate court granting a license to sell real estate. Affirmed. The facts are stated in the opinion.

William J. Gray, for appellant, contended as stated in the opinion.

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H. E. Spalding, for petitioner.

MORSE, J. Israel J. Beniteau died August 31, 1883, intestate, leaving a widow and one child, Ame P. T. Beniteau, who, on October 16, 1883, was appointed administrator. September 22, 1884, the claim of Elizabeth Fales was allowed by the commissioners on claims at the sum of $1,081. On January 28, 1888, a petition was filed asking for the removal of Ame P. T. Beniteau, and on February 27, 1888, he was formally removed. On the same day a petition was filed asking for the appointment of William R. Dodsley as administrator, and on March 20 he was so appointed. Thereupon Mr. Dodsley asked leave to sell some of the decedent's real estate for the purpose of paying the Fales claim and of paying the charges of administration. On April 11, 1888, a license to sell was granted. On appeal to the circuit court, the order of license was affirmed, and a writ of error has been sued out to review the proceedings.

The errors relied on are:

1. That there was no showing of insufficiency of assets in the original administrator's hands.
2. That the court lost its jurisdiction to grant the license at the end of four years from the date of the appointment of the original administrator.

These objections to the order of the probate court have no merit.

1. The petition of Dodsley alleged that it was necessary to sell real estate to raise the sum of $1,200, or thereabouts, to pay the just debts and charges against the estate, and that no personal estate of the deceased had come into his hands. On the hearing of the petition, the proofs supported these allegations. How. Stat. § 6025, provides:

"When the personal estate of any deceased person, in

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the hands of his executor or administrator, shall be insufficient to pay all his debts, with the charges of administering his estate, his executor or administrator may sell his real estate for that purpose, upon obtaining a license therefor, and proceeding therein in the manner hereinafter provided."

See, also, sections 6026, 6027, 6036. The statute was fully met by the petition and proofs.

2. From the date of the appointment of the original administrator, October 16, 1883, to the granting of the license to sell, April 11, 1888, there elapsed a period of less than four years and six months, but the sale under the license could not be had until after such period had expired. The appellant relies upon *Hoffman v. Beard*, 32 Mich. 218. This case has been distinguished from cases like the present, and does not apply. See *Church v. Holcomb*, 45 Mich. 29; *Pratt v. Houghtaling*, Id. 457; *Larzelere v. Starkweather*, 38 Id. 96; *Norman v. Olney*, 64 Id. 553. In *Larzelere v. Starkweather*, 38 Mich., at pages 100 and 101, the decision in *Hoffman v. Beard* is expressly limited to the facts in that case, and the reasoning of the opinion discarded as binding upon the Court. It will be noticed that the opinion in both cases is written by the same judge, Mr. Justice MARSTON.

In this case the delay in not paying the adjudicated claim of Elizabeth Fales was not the fault of the present administrator nor of the probate court. The testimony upon the hearing showed that the estate was amply sufficient to pay this claim and all other charges against it. The appellant was removed for refusing to pay this claim, and is alone at fault for its non-payment. He is sole heir to the real estate of his father, subject to the widow's dower, which cannot be sold to pay debts. Under the circumstances, he cannot be heard to raise this last objection And, in my opinion, *Hoffman v. Beard* has been substantially overruled, and is not good law.

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The order of the probate court is affirmed, with costs of this Court and the circuit against the appellant. It will be certified accordingly.

The other Justices concurred.

FREDERICK S. AYRES, JAMES S. AYRES, AND EBENEZER R. AYRES v. LANGDON HUBBARD.

Jury—Right of peremptory challenge.

After the parties have announced themselves satisfied with the jury, and they are sworn, neither party can peremptorily challenge a juror, against the objection of the opposite party.

Error to Huron. (Beach, J.) Argued October 15, 1891. Decided October 30, 1891.

Trover. Defendant brings error. Reversed. The facts are stated in the opinion.

W. T. Bope and *Horace G. Snover*, for appellant.

James H. Hall, for plaintiffs.

LONG, J. This cause was tried in the Huron circuit court, where plaintiffs had verdict and judgment. Defendant brings error.

But one question is raised upon this record. It appears that after the jury had been impaneled and sworn in the cause, and after a recess of two hours, the parties came into court, and plaintiffs, by their counsel, asked leave to challenge one of the jurors peremptorily. The cause

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had not been formally opened to the jury, and no testimony yet taken. In support of the claim to challenge one of the jurors, plaintiffs' counsel filed an affidavit setting forth—

"That, at the time of the announcement by him that he was satisfied with the jury drawn in this case, he believed that the jurymen drawn were each of them competent to try the case, and were situated so that they could fairly and impartially try the same on the testimony; that he has since learned that the juryman John Sparling is so situated in regard to the defendant, and so connected with the defendant in various ways, that he cannot, as deponent believes, fairly try the case; and that the matters that lead him to believe the said juryman cannot fairly try the case came to his knowledge since said jury was sworn."

It was claimed by counsel that it was a matter in the discretion of the court. The court, while expressing some doubt of his authority to permit the challenge, did permit it. The juror Sparling was excused, one juror from the regular panel drawn in his place, and the panel again sworn. To this proceeding defendant's counsel objected, and took an exception.

Before the original jury was impaneled, plaintiffs' counsel had examined the juror Sparling as to his competency, and had asked him the following question, to which he made answer:

"Is there anything between you and Frank Hubbard that would make it disagreeable for you to decide the case against his father?

"A. No, sir: not a bit."

There was nothing appearing upon the examination of the juror Sparling, or set forth in the affidavit filed, which would have warranted the court in excusing him for cause. The question is therefore presented whether the trial court may, in its discretion, after the panel has

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been sworn in the cause, permit either party to challenge a juror peremptorily, and have another drawn in his place, against the objections of the opposite party.

The statute provides that in all civil cases each party may challenge peremptorily four jurors. How. Stat. § 7607. The right to peremptory challenge in civil cases was unknown to the common law, and is purely statutory, and neither party can be deprived of this right until the jury is sworn. When the jury has been impaneled and duly sworn to try the cause, this right to peremptory challenge must end. It was not within the discretion of the trial court, after the jury had been sworn to try the cause, to permit this peremptory challenge. The law provides that the first 12 persons who shall be approved as indifferent between the parties shall be sworn, and shall be the jury to try the cause.[1] These 12 jurors were sworn, and the question could not, therefore, be opened, except by consent of the parties, that jury set aside, and a new jury impaneled, simply for the purpose of permitting one of the parties to exercise a right which should have been exercised before the jury was sworn.

This exact question has never been presented to this Court, but in *Thorp v. Deming*, 78 Mich. 124, error was assigned upon the ruling of the court in refusing to permit the plaintiff a peremptory challenge after the jury was sworn. It was said by Mr. Justice CAMPBELL, in speaking on that subject:

"No authority has been shown to us for allowing a peremptory challenge after the jury is sworn, and there was no error in so holding."

Some period must be fixed during the impaneling of the jury and the actual commencement of the trial when the right to peremptory challenge must end, and we are satisfied that when the parties announce themselves satis-

[1] How. Stat. § 7599.

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fied, and the panel of jurors is sworn to try the cause, the right ends. The court was in error, therefore, in the ruling made.

Judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

JAMES H. HALL v. NICHOLAS PETTIT, COMMISSIONER OF HIGHWAYS, AND WILLIAM J. CROCKARD, CLERK, OF THE TOWNSHIP OF DWIGHT.

Highways—Establishment of private road—Validity of proceedings.

The proceedings of the defendant commissioner in opening a private road through petitioner's land are quashed for the following reasons:

a—The petition for the road contains no averment that the petitioner has no other access to his lands, and the record contains no evidence that a showing of that character was made.

b—The owner of the land was a resident of the county, but absent therefrom, and no notice was served upon the occupant of the land.

c—The record contains no recital that 18 disinterested freeholders were selected, or that 6 names were struck off, or that a citation was issued by the commissioner to such freeholders, or that the jury were sworn, or that the commissioner proceeded to lay out the road.

d—No record was made and recorded in the office of the township clerk, as required by How. Stat. § 1391.

Certiorari to review proceedings of highway commissioner in opening a private road. Submitted on brief October 15, 1891. Proceedings quashed October 30, 1891. The facts are stated in the opinion.

James H. Hall, in *pro. per.*, contended:

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1. That the proceedings should be quashed, for reasons stated in the opinion; citing *Goldsmith v. Highway Commissioners*, 14 Mich. 528; *McCaslin v. Camp*, 26 Id. 390; *Van Auken v. Highway Commissoners*, 27 Id. 414; *Dupont v. Highway Commissioners*, 28 Id. 362; *Paul v. City of Detroit*, 32 Id. 108; *Association v. Highway Commissioners*, 34 Id. 36; *Ayres v. Richards*, 38 Id. 214; *Turner v. Village of Stanton*, 42 Id. 506; *Wright v. Rowley*, 44 Id. 557.

McGRATH, J. *Certiorari* to the highway commissioner and clerk of the township of Dwight, in the county of Huron, to review proceedings instituted to open a private road through petitioner's land.

Petitioner alleges that he resides, and has for 16 years last past resided, in the village of Port Austin, Huron county, and owned and owns the land through which it is proposed to open the private road; that on April 22, 1890, petitioner left the State, going to Alabama; that one Cole was at that date, and for more than a year had been, in the possession and occupancy of said land under a written lease having nearly four years to run after the last-named date; that on or about April 28 a notice was left with petitioner's clerk by the highway commissioner, notifying petitioner to meet said highway commissioner at his residence on May 3 to aid in striking a jury to determine as to the necessity of said road, etc.; that said notice was mailed to petitioner, but failed to reach him during his stay in Alabama, and was returned to him at his residence, where he received it May 5, 1890; that no notice was served upon said Thomas Cole; that the person applying for said road claims that the same has been opened, and that he has paid the award made by the jury, and threatens to take possession; that the said private road cuts off and separates one 40-acre tract of petitioner's land from the balance thereof; that it is claimed that the jury awarded to petitioner the sum of $10, but the same has not been paid to or received by

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petitioner; that respondent Pettit has informed petitioner that there is nothing on file in his office pertaining to the opening of said road.

Respondent Pettit makes no return. Respondent Crockard returns that—

"On the 7th day of May, A. D. 1890, the proceedings of the jury to determine as to a private road hereto annexed, marked 'Exhibit A,' was all that was filed in my office relating to said private road of Herman Holstinski, until the 16th day of June, A. D. 1890, when the application for said private road which is hereto annexed, marked 'Exhibit B,' was filed in my office by Nicholas Pettit, highway commissioner, which Exhibits A and B are true copies of all the records and files on file in my office at this date pertaining to said private road."

Exhibit A, referred to in said return, is signed by the jury, and is as follows:

"We, the undersigned, a jury selected to determine as to the necessity of laying out a private road as hereinafter described, and to assess the damages therefor, having been duly cited to appear pursuant to a citation issued by Nicholas Pettit, commissioner of highways of said township, met at the residence of Herman Holstinski, in said township, on the day of the date hereof, and, having been duly sworn by said commissioner, as required by law, and having viewed the premises, do hereby certify that we have determined that it is necessary that a private road should be laid out, running as follows: Commencing at the quarter stake on the west side of section thirty-two, and running east to the south-east quarter of the north-west quarter of said section thirty-two, to be one rod wide, and to be on the north side of the quarter line running east and west through section thirty-two, being over the lands owned and occupied by James H. Hall; and that we appraise the damages to said James H. Hall by reason of the laying out of said road over his land at the sum of ten dollars.

"Given under our hands, this 7th day of May, A. D. 1890."

The following is a copy of Exhibit B:

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"To the commissioner of highways of the township of Dwight, county of Huron: The undersigned, a freeholder of the said township of Dwight, does hereby make application to you to lay out a private road in part of said township not included within the corporate limits of any city or village, and respectfully ask that you will proceed to lay a private road as follows: Commencing at the quarter stake on the west side of section thirty-two, and running east to the south-east quarter of the north-west quarter of section thirty-two, said road to be one rod wide, and to be on the north side of the quarter line running east and west through section thirty-two.

"HERMAN HOLSTINSKI.

"Dated the 23d day of April, 1890.

"Received for record and recorded this 16th day of June, A. D. 1890."

The record is clearly insufficient to sustain the proceeding. The petition for the road contains no averment that the petitioner has no other access to his lands, and the record contains no evidence that a showing of that character was made. No proof of service of notice appears therein. The statute provides for notice in writing to the owner or occupant. The service under the statute must be personal, unless the land is non-resident, and the owner does not reside in the county. Here the owner resided in the county, but was absent from the State. The land was occupied, and no notice was served upon the occupant. The record contains no recital that 18 disinterested freeholders were selected, or that 6 names were struck off, or that a citation was issued by the commissioner to such freeholders, or that the jurors were sworn by the commissioner, or that the commissioner proceeded to lay out the road.

The statute requires that the commissioner shall cause a record to be made in the clerk's office, which shall be signed by the commissioner, and recorded by the township clerk. Nothing having the semblance of a record

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appears in the clerk's office. The record must show a compliance with the requirements of the statute.

The proceedings must be quashed, with costs against respondent Nicholas Pettit.

The other Justices concurred.

JAMES L. EDSON ET AL. v. HENRY J. LALONDE AND SERAPHINE LALONDE.

Practice in circuit court—Judgment by default—Affidavit of non-appearance.

No affidavit of non-appearance is necessary before entering a defendant's default for failure to plead, of which fact the court will take judicial notice: citing *Leonard v. Woodward*, 34 Mich. 514; *Elliott v. Farwell*, 44 Id. 186; *Bogue v. Prentis*, 47 Id. 124.[1]

Error to Chippewa. (Steere, J.) Submitted on briefs October 14, 1891. Decided October 30, 1891.

[1] In the first two cases cited, the default was entered, as in this case, for a *failure to plead;* and in *Bogue v. Prentis* it was admitted that there had been no appearance, and the Court held that the neglect to file an affidavit showing such fact was no ground for reversing the judgment on writ of error, the defendant not having been injured, and that the omission might have been cured *nunc pro tunc* in the court below.

In *Low v. Mills*, 59 Mich. 35, 43, it is held that the failure to file an affidavit of non-appearance is no ground for setting aside an order *pro confesso* entered for want of an appearance, as the records will always disclose the fact if an appearance has been entered; which appearance is said to be different from one at law, where service of notice of retainer is an appearance, which makes it necessary to show by affidavit defendant's non-appearance, since the records and files might not disclose the fact.

In *Steers v. Holmes*, 79 Mich. 430, it is held that the Court will take judicial notice of the failure of a defendant *to plead*, and that the entry of his default without filing an affidavit showing such failure cannot be taken advantage of on error; citing *Leonard v. Woodward*, 34 Mich. 514.

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Assumpsit. Defendants bring error. Affirmed. The facts are stated in the opinion.

E. S. B. Sutton, for appellants.

Goff & Cady, for plaintiffs.

LONG, J. This cause was commenced by declaration in the circuit court for the county of Chippewa. A rule to plead was entered, and the declaration, with notice of rule indorsed thereon, was personally served upon each of the defendants within that county. The declaration contained a copy of the promissory note upon which the action was based. Neither of the defendants appeared or pleaded, and after the lapse of 20 days after service of declaration their default was duly entered.[1] The default was thereafter made absolute, and on May 16, 1891, judgment was entered for the amount of the note and interest. Defendants thereafter attempted to settle a bill of exceptions in the case, which was refused.

Defendants bring the case to this Court by writ of error. Eight errors are assigned. They are all too frivolous to be noticed, but we shall notice the fifth, upon which claim is made that,—

"No affidavit of the non-appearance of the defendants, or either of them, having been made and filed in the cause, the judgment rendered by the court below is irregular and void."

No affidavit of non-appearance was necessary before entry of default. The court would take judicial notice from the record that no appearance had been entered and no plea filed by the defendants. The case falls directly within the ruling of this Court in *Leonard v. Woodward,* 34 Mich. 514; *Elliott v. Farwell,* 44 Id. 186; *Bogue v. Prentis,* 47 Id. 124.

[1] The default was entered for want of a "plea, answer, or demurrer."

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The case, apparently, was removed to this Court for the purpose of delay and vexation, for which the defendants must respond in damages. The judgment will be affirmed, and $25 in addition to the taxable costs will be allowed against the defendants for vexatious appeal.

The other Justices concurred.

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WILLIAM J. SHIELDS ET AL. v. JOHN CHRIST JACOB, JOSEPH T. LOWRY, AND AUGUSTUS G. KRONBERG, BOARD OF ELECTION COMMISSIONERS FOR THE CITY OF DETROIT.

Elections—Ballots—Vignette—Nominating conventions.

Certain provisions of Act No. 190, Laws of 1891, entitled "An act to prescribe the manner of conducting and to prevent fraud and deception at elections in this State," and made applicable to municipalities by Act No. 194, Laws of 1891, are construed as follows:

a—Where the vignette adopted by a political party, and forwarded to the election commissioners with the names of the candidates nominated, combines within it the name of the party or political organization which the committee forwarding it represent, it is unnecessary to put another heading below it.

b—When the call for a convention of a political party results in the holding of two nominating conventions, it is not the province of the board of election commissioners to determine which convention represented the *regular* nominating convention of the party, but it is their duty to place upon the ballot the names of the candidates certified to them by the committee of either branch of the party represented by the two conventions; and if the name of a party shall be certified by each of the two committees, it is the duty of the commissioners to print the name so certified without further addition or distinctive designation than such as is contained in the certificates so furnished.

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Mandamus. Submitted October 29, 1891. Granted October 30, 1891.

Relators apply for *mandamus* to compel respondents to place the names of certain candidates upon the ballot to be used at a municipal election. The facts are stated in the opinion.

Alfred Russell (*Don M. Dickinson, George V. N. Lothrop,* and *J. Logan Chipman,* of counsel), for relators.

John J. Speed and *Charles S. McDonald,* for respondents.

PER CURIAM. The petition of the relators sets forth the appointment of the respondents as election commissioners of the city of Detroit on the 6th day of October inst., and also the calling of the Democratic city convention for the nomination of city officers, the holding of such convention, and the proceedings had thereat, and the fact that such convention divided, and two tickets were nominated,—one of them headed by William G. Thompson for mayor, and the other by John Miner, also for mayor; that the committee of that branch of the Democratic party supporting John Miner for mayor prepared a ticket consisting of the officers nominated by the convention, and also a vignette consisting of a right arm holding a flag, upon which was printed the words, "Regular Democratic Ticket," duly certified by them, which was presented to each member of the board of election commissioners, with a request that it be printed upon the ballots to be voted at the election to be held on the 3d day of November prox.

They further set up that the election commissioners refuse to say whether they will print such ticket or not, but, from rumors and reports, they believe it is the

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intention of the election commissioners not to print such ticket upon the ballot authorized by law to be voted; that they have inquired of such commissioners whether they intend to print such ticket, and such commissioners have refused to give any answer to such inquiry. They ask for a *mandamus* to be directed to the members of the board of election commissioners, commanding them to "organize, and proceed to prepare, and cause to be printed, ballots bearing upon them, as the regular Democratic ticket, the ticket and candidates and vignette embraced in the certificate of relators hereinbefore set forth;" and that the said John Christ Jacob, Joseph T. Lowry, and Augustus G. Kronberg, board of election commissioners of the city of Detroit, be commanded to place upon the ballot for the municipal election to be held in the city of Detroit on November 3, 1891, in a regular and due form, the list of candidates for mayor and city offices named and embraced in the certificate hereinbefore referred to.

The board of election commissioners have answered the petition, stating that they met on the 26th day of October, and organized as a board, and elected as chairman John Christ Jacob, and George L. Henrion as secretary; that at such session they directed the secretary to insert in the daily newspapers a notice that the board of election commissioners for the city of Detroit would be in session at the city clerk's office in the city hall on Tuesday and Wednesday, October 27 and 28, 1891, at noon on said days, for the purpose of receiving from the chairmen of the several political organizations the names of the persons nominated to the several city and ward offices to be filled at the coming charter election, and that the proof copy of the ballot which is to be prepared by said board of election commissioners would be open for the inspection of the chairman of each of the political

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organizations on Saturday and Monday, October 31 and November 2, at the office of the city clerk in the city hall. The answer sets forth that the notices were published in certain papers, naming them.

It also states that at a session of the board held on October 27 there was filed with said board a certificate, a copy of which, signed by William J. Shields as chairman, is set forth in said petition; that prior to said meeting of October 27 there was not at any time presented to said board any certificate from any committee of any political party setting forth the names of candidates for office to be voted for at the next charter election to be held in said city; that on receiving said certificate said board directed its secretary to place such certificate on file, and to notify William Cosgrove, the secretary named in said certificate, that said certificate was informal, for the reason that it did not designate the name of a party or political organization which the said chairman and secretary represented.

They deny that they had, as individuals or as a board, expressed any intention as to their individual action, or any opinion as to how the said board should determine any question which might arise as to the printing upon the election ballots of the names of the candidates mentioned in said certificate, and for the reason that they desired to avoid discussion with or the importunities of personal or political friends in relation to the printing of said tickets; and they admit that when approached they each declined, excepting when acting as a board, to express any such opinion or determination.

They deny that as a board of election commissioners, or as individuals, a majority of said board, or either of them, claimed the right to decide as to the tickets, one of which is headed by John Miner as a candidate for

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mayor, and the other by William G. Thompson as a candidate for said office, as to which one was nominated by the regularly called convention of any party, or to decide which was the regularly called convention, as between the convention which nominated the ticket headed by said Miner and the convention which nominated the ticket headed by Thompson. They also deny the allegations in the petition impugning their good faith and honesty as members of said board. They further answer and aver that—

"They have not as a board, excepting as hereinbefore stated, acted upon or determined as to the printing of said names on said ballots, but respondents aver that at a meeting of their board held on the 28th day of October, 1891, said board by resolution determined to print, on the official ballot which they are to prepare, all the names of candidates for any and all of the several city, ward, and precinct offices which have been nominated by the regularly called convention of the several political parties, and which shall be duly certified to said board by the respective chairman and secretary of said organizations, and, unless otherwise ordered by your honorable Court, it is the intention of respondents to print the names of all the candidates on the so-called Miner and Thompson Democratic ticket. Respondents also determined to print on the official ballot any vignette which the various political organizations may designate, provided said party supply respondents with a sufficient number of cuts in time to enable them to use the same."

In closing their said answer, respondents state as follows:

"These respondents respectfully submit themselves to the order of the Court, and they pray, if any order be made herein, that they may be advised thereby whether they are required by law to determine which of the list of candidates nominated as aforesaid they should cause to be printed on the ballot prepared by them, or whether they should print on said ballots both of said lists of candidates; and they pray to be further advised, if the

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same name of a party shall be certified by both of two committees, whether the names so certified shall be printed without further addition or distinctive designation."

We are clearly of the opinion that the board of election commissioners were in error in supposing that the notice sent by Mr. Shields, and served upon them, was defective for the reason that it did not designate the name of a party or political organization which the said chairman and secretary represented. The vignette, which was a part of the certificate and notice served upon the board, combined within it the name of the party or political organization which they represented, and, where the name of the party is combined with the vignette, it is not necessary to put another heading below it.

The petition shows that the call for a convention of the Democratic party of the city of Detroit resulted in two nominating conventions; and we are of opinion that each of the tickets nominated at such conventions, containing the names of the persons nominated by such conventions, with the vignette and heading, if any is furnished by the committee of such conventions, should be printed upon the ballot. We do not consider that it is the province of the board of election commissioners to determine which convention represented the regular nominating convention of the party; but that it is the duty of said board to print and place upon the ballot the names of the candidates certified to them by the committee of either branch of the party represented by the two conventions held to nominate city officers, and that the names so certified to them in each list shall be embraced in the ticket so printed; and that it is their duty, further, if the same name of a party shall be certified by each of two committees, that the name so certified shall be printed without further addition or

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distinctive designation than such as is contained in the certificates furnished.

And, inasmuch as the respondents request that they may be advised upon the points stated in their answer, the order for *mandamus* will issue, commanding them to print upon the ballots to be prepared by them the ticket so furnished to them by the committee of the convention which placed in nomination John Miner for mayor, and also the vignette furnished them by the committee, and that the tickets so printed by them shall contain the name of each of the candidates nominated for the respective offices by said convention in the form substantially prescribed by the statute, with the name which the committee certify to them as the distinctive name of the party, without further addition or distinctive designation.

As the answer denies any design to avoid the law or their duty as election commissioners, no costs will be awarded against them.

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JOHN CHATEAU v. JOHN CHRIST JACOB, JOSEPH T. LOWRY, AND AUGUSTUS G. KRONBERG, BOARD OF ELECTION COMMISSIONERS FOR THE CITY OF DETROIT.

Elections—Ballots—Candidate for alderman.

1. Aldermen are elected by the electors of the wards, and represent the people of the wards in the legislative body of the city.
2. It is not the duty of the board of election commissioners provided for by Act No. 194, Laws of 1891, to print upon the ballot the name of a candidate for alderman not selected by any assemblage or meeting of electors of his ward.

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Mandamus. Submitted October 29, 1891. Denied October 30, 1891.

Relator applies for *mandamus* to compel respondents to place his name upon the official ballot as a candidate for alderman on the "Citizens' Committee's Independent Ticket." The facts are sufficiently stated in the opinion.

Barbour & Rexford, for relator.

PER CURIAM. Aldermen are elected by the electors of the wards. They therefore represent the people of the wards in the legislative body of the city.

A candidate for the office of alderman ought to be placed in nomination by electors of his ward, and such nomination ought to represent the wishes of a respectable portion of such electors, in order to entitle the ticket as a distinctive party ticket to be printed upon the ballot. Any one has a right to announce himself as a candidate, but, if all persons who should so announce themselves as candidates are of right to have their names printed upon the ballot, it is evident that the purposes of the law might be frustrated by filling the ballot with the names of independent candidates for such office.

The law does not deny to any person the right to be voted for upon the ballot, but, in cases where the person is not the nominee of a convention called for the purpose of making nominations, the person can be voted for by writing his name upon the ballot in the blank required to be preserved for that purpose in the ballot. It does not appear that the relator was selected by any assemblage or meeting of electors of his ward. If he were, it would be the duty of the commissioners to place his name upon the ballot.

As the petition now stands, the application must be denied.

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GEORGE KEITH v. THE SANDS & MAXWELL LUMBER COMPANY.

Principal and agent—Withdrawal of authority—Notice.

Where, pending negotiations by wire and mail for the purchase of cedar posts, the vendor wrote to the vendee that if certain posts were not sold he could have them at a stated price, and that he would know by a certain date if the posts were sold, such letter amounted in law to a withdrawal of said posts from sale until the date named, and was a sufficient notice to the vendee that he must deal with the vendor personally; and a sale by an agent in charge of the posts, made after such date, is held not binding upon the principal.

Error to Oceana. (Dickerman, J.) Argued June 5, 1891. Decided October 30, 1891.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

W. E. Ambler (*Montgomery & Bundy*, of counsel), for appellant.

Montgomery & Lee, for plaintiff.

MORSE, J. This is a suit for damages for breach of an alleged contract on the part of the defendant to sell the plaintiff 40,000 paving posts. The plaintiff recovered judgment in the Oceana circuit court for $1,558.

The facts shown upon the trial are substantially as follows: The plaintiff resided in Lansing, Mich., and is a jobber and contractor. In the summer of 1887 he was engaged in paving at Michigan City, Ind., and had a contract there for laying down a cedar-block pavement. He went to Pentwater, Mich., the location of the business office of the defendant corporation, looking for cedar,

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and there saw both Sands and Maxwell, the business managers of the defendant, who, with their wives, seemed to be the corporation. Maxwell showed him a lot of cedar posts at Pentwater, and they had some talk about them, but plaintiff did not buy, nor was there any price set upon them. In the conversation plaintiff testifies that Maxwell spoke about the defendant having some posts at Prentis Bay, and said:

"I don't know whether the posts at Prentis Bay are sold or not. I have not heard from our man up there in some time."

This talk is not denied by Maxwell. This was in the early part of July. Plaintiff went from Pentwater to other localities looking for cedar. On the 23d day of July, 1887, he wrote the following letter:

"SANDS & MAXWELL,

"Pentwater, Mich.,—

"*Gents:* In accordance with the understanding when I was at your place, I now make you this proposition for cedar posts, delivered on dock at Michigan City, Indiana: Will give you sixteen cents for posts five inches and upwards, or seven dollars per cord. After the first cargo, I am satisfied that I can do better by you on inspection than you can do in Chicago. The first lot would have to be about Chicago inspection. If you accept my proposition, telegraph me at once, so I may stop further negotiating. If you furnish by the cord, can use as small as four inches.

"Yours, etc., GEORGE KEITH."

Receiving no answer to this letter, plaintiff, on the 28th of July, sent a telegram as follows:

"Have you answered letter? Will you give a price on cedar?"

In answer to this, Keith, on the 29th, received in the same mail, at Lansing, two letters, which read, respectively, as follows:

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"PENTWATER, MICH., 7-28-87.

"GEORGE KEITH, Lansing,—

"*Dear Sir:* Your telegram received. We have sold our posts at eighteen and a half cents each. All we have. None for sale.

"S. M. L. Co."

"PENTWATER, MICH., July 28, 1887.

"GEORGE KEITH, Lansing,—

"*Dear Sir:* If posts at Prentis Bay are not sold, you can have them at fourteen cents over the rail. We will know Monday, the 1st.

"Respectfully, SANDS & MAXWELL."

It appears from the testimony of Mr. Sands that he wrote the last letter in the morning, and that Maxwell wrote the other, he thinks, afterwards, and that they received mail between the writing of the letters. It also appears that Mr. Maxwell testified upon a previous trial of this case that the letter written by him referred to the posts at Pentwater. The 29th of July was on Friday. Without replying to these letters, Keith started immediately for Prentis Bay, and reached there on the evening of Tuesday, August 2. Here he found Robert Hyde in charge of the defendant's property and affairs, and on the next day bargained with him for the purchase of 40,000 cedar posts, paid him $100 down, and took the following receipt:

"PRENTIS BAY, MICH., August 3, 1887.

"Received of George Keith the sum of one hundred dollars on account of 40,000 peeled paving posts, five inches and upwards at smaller end, and eight feet long, for which he is to pay, in a manner satisfactory to our firm at Pentwater, eleven cents and one half each, delivered over rail of vessel. Such portion of said 40,000 posts as may be under five inches, and not less than four inches, he is to pay eight cents each for.

"SANDS & MAXWELL LUMBER CO. *per James Grover.*"

Mr. Hyde and plaintiff dictated the receipt to Grover, who was a clerk of the defendant, and Hyde directed

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Grover to sign it as he did. Hyde also wrote a telegram, and handed it to Keith to send to Sands & Maxwell when he reached Cheboygan, on his way home. This telegram was as follows:

"PRENTIS BAY, Aug. 3, 1887.
"SANDS & MAXWELL LUMBER CO.,
"Pentwater:
"Have sold George Keith 40,000 paving posts, at eleven and one-half cents each over rail. Payment to be made satisfactory to you."

Keith did not send the telegram, for the reason, as he claims, that he was delayed in reaching Cheboygan, and when he got there found that Hyde had preceded him. In the conversation between Keith and Hyde, before the posts were purchased, Hyde stated to Keith that "he had a letter from the home company saying that they expected to sell them at fourteen cents apiece." Keith testifies that he answered, "I presume I am the man they are expecting to buy, as I have a letter in my pocket." Hyde testifies that he told Keith that Sands & Maxwell had been figuring with some parties on prices to sell their posts, and Keith replied that he was the man they were figuring with. On July 30, 1887, the defendant made a contract with Hackley & Hume, of Muskegon, by which it sold to them one cargo of these paving posts at Prentis Bay, with an option for the balance, up to 40,000. Hackley & Hume did not, however, take but one cargo, about 2,200. On the same day defendant wrote to Hyde of this sale, but he did not receive it until after his agreement with Keith. The defendant refused to deliver any posts to plaintiff, and he brought this suit.

It is contended, in the first place, by defendant that the letter, one of the two received in the same mail by plaintiff, stating that all its posts were sold, was an

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unequivocal revocation of any authority which Hyde might previously have had to negotiate a sale, and a complete notice to plaintiff of such revocation. If this were so, it would end the case; but we think that the plaintiff had a right to infer that this letter referred to the posts at Pentwater, and that the other letter was the latter one; and it would seem from all the evidence in the case that it did refer to the Pentwater posts, and to them alone.

It is also contended that, even if it be assumed that this letter was written first, and referred to the Pentwater posts, still the letter stating, "If posts at Prentis Bay are not sold, you can have them at fourteen cents over the rail; we will know Monday, the 1st,"—was full notice of the withdrawal of the posts from the market until the 1st day of August, and also notice that no subordinate agent could sell such posts pending the negotiations between Sands & Maxwell and the parties referred to in such letter; that it was not fair dealing or open to the plaintiff on the receipt of that letter to start at once for Prentis Bay to deal with Hyde without the knowledge of Sands & Maxwell, and without informing himself whether they had in the meantime, before his bargain with Hyde, closed the sale referred to in such letter. On the other hand, the plaintiff's counsel claim that the letter did not disclose to plaintiff that they were negotiating with any one else for the sale of these posts; that he supposed, and had a right to suppose, that they were waiting to hear from Hyde to find out whether he had sold the posts or not.

The circuit judge left it to the jury to determine what the effect of this letter was upon the plaintiff under all the circumstances of the case. In this we are all agreed he was in error. As a matter of law, this letter was a withdrawal of these posts from sale to the plaintiff until

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Monday, August 1, and a sufficient notice to him that he must deal with defendant in relation to them. He was not authorized to start at once to Prentis Bay, and open negotiations with their agent there; and, if this had been permissible, he could not have made a contract with such agent, binding upon defendent, for less than 14 cents, in view of the letter he had received.

As this virtually disposes of the case, we shall not enter upon a discussion of the other errors assigned. The circuit judge should have directed a verdict for the defendant.

The judgment is reversed, and a new trial granted, with costs of both courts to defendant.

The other Justices concurred.

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MARCUS T. RIPLEY v. JACOB SELIGMAN.

Resulting trust—Bona fide purchaser—Quitclaim deed—Condition—Witness—Matters equally within knowledge of deceased person—Laches.

1. How. Stat. § 7545,[1] prohibiting the opposite party, in a suit "prosecuted or defended by the heirs, assigns, devisees, lega-

[1] See the following cases involving the construction of this statute:
McMillan v. Bissell, 63 Mich. 75; *Wallace v. Wallace*, Id. 331; *Pendill v. Neuberger*, 64 Id. 220; *Stackable v. Stackable Estate*, 65 Id. 515; *Pendill v. Neuberger*, 67 Id. 562; *Hood v. Olin*, 68 Id. 175; *Taylor v. Bunker*, Id. 258; *Hillman v. Schwenk*, Id. 293; *Buffum v. Porter*, 70 Id. 623; *M'Cutcheon v. Loud*, 71 Id. 434; *Webster v. Sibley*, 72 Id. 630; *Doolittle v. Gavagan*, 74 Id. 11; *Beardslee v. Reeves*, 76 Id. 661; *In re Lautenshlager's Estate*, 80 Id. 285; *Wilson v. Wilson Estate*, Id. 472; *Lake v. Nolan*, 81 Id. 112; *Barker v. Hebbard*, Id. 267; *Jackson v. Cole*, Id. 440; *Lyttle v. Railway Co.*, 84 Id. 289; *McHugh v. Dowd Estate*, 86 Id. 412; *Penny v. Croul*, 87 Id. 15.

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tees, or personal representatives of a deceased person," from testifying to facts which, if true, must have been equally within the knowledge of the deceased, is construed as follows:

a—The word "assigns" is used in its legal sense, and signifies a person to whom any property or right is transferred by a deceased person in his life-time.

b—The statute is broad enough to cover *successive* transfers, or where the controversy depends upon the acts or dealings with the property of the deceased in his life-time; and any one who is called upon to prosecute or defend some interest which is affected by the act or agreement of the deceased party through whom he claims may invoke the protection of the statute.

c—The case of *Twiss v. George*, 88 Mich. 253, in which it was held that the statutory prohibition did not extend to controversies with third persons acting in their own right as purchasers during the life-time of the deceased, and not taking by *post mortem* estate, arose under the statute as it read before the 1875 amendment, and cannot be taken as an exposition of the present law.

d—While the representatives of a deceased person cannot waive the provision of the statute (*McHugh v. Dowd Estate*, 86 Mich. 412), the decedent's assigns may do so.

e—In applying the statute, care should be observed in distinguishing between matters equally within the *knowledge* of the deceased and matters within his *information*, as it is only as to the first that the opposite party is not permitted to testify.

f—The statute was not intended to exclude testimony concerning facts capable of proof by documentary evidence accessible to both parties, as, for instance, the dates or contents of written instruments of a public character, where such testimony is not excluded under other rules governing the admission of testimony.

2. There is no impropriety in a plaintiff refusing to answer questions whether he has made any arrangements with any person to carry on the suit for a share of what may be recovered therein, or by which any other person than himself is to pay the whole or any part of the expenses of the litigation, such inquiries being objected to by his counsel, who instructs him not to answer them.[1]

3. The owner of the minutes of pine lands agreed in writing to select therefrom and locate in the name of a second party 5,000

[1] See *Denman v. Johnston*, 85 Mich. 388, 389 (head-note 12), and cases there cited.

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to 10,000 acres, the second party agreeing to furnish the necessary means, and to give to the first party an undivided one-fourth part of all lands so selected and located, which agreements were fully performed except the conveyance to the first party of his interest in the lands located. And it is held that the contract did not declare a trust; that upon its face it had simply the elements of an executory contract; and that it was the duty of the second party to make such conveyance, and until it was made the law would imply that he held the title to the interest agreed to be conveyed in trust for the party entitled to such conveyance.

4. While neither party to such a contract might be able to enforce specific performance of the respective agreements to select and to furnish the money with which to locate the lands, either would have a remedy at law for damages for non-performance of the contract; citing *McCreery v. Green*, 38 Mich. 172.

5. Implied or resulting trusts may be established by proving the transaction out of which they result or are implied, and such proof may be by parol testimony.

6. A grantee in a quitclaim deed may invoke the aid of How. Stat. § 5572, which declares that "no implied or resulting trust shall be alleged or established to defeat or prejudice the title of a purchaser for a valuable consideration, and without notice of such trust;" and he has the burden of showing the facts necessary to bring him within the statute.

7. The considerations recited in deeds are not sufficient evidence to show the consideration upon which a party can rely when he has the burden of proving that the consideration paid was valuable in a suit between the grantee and third persons.

8. The case of *Peters v. Cartier*, 80 Mich. 124, holding that a grantee in a quitclaim deed is not a *bona fide* purchaser, and takes only the interest of his grantor, arose under the recording laws, and is, therefore, authority only in cases arising under such laws.

9. A clause in a quitclaim deed of an *undivided interest* in lands, purporting to be executed in consideration of the sum of one dollar and of love and affection, which declares that the conveyance is made upon the express condition that the grantee shall pay or cause to be paid, in due season, all taxes assessed upon the *whole* of a portion of the lands described in the deed, is held to be a condition subsequent, and not the valuable consideration referred to in How. Stat. § 5572, under which no implied or resulting trust can be alleged or established to defeat or prejudice the title of a purchaser for a valuable consideration.

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10. A devisee takes no greater rights in land devised than the devisor had, and is not a *bona fide* purchaser for a valuable consideration; citing *Burns v. Berry*, 42 Mich. 176.
11. Lapse of time alone is not sufficient to bar equitable relief.
12. The term "laches" involves the idea of negligence,—a neglect or failure to do what ought to be done under the circumstances to protect the rights of the parties to whom it is imputed, or involving injury to the opposite party through such neglect to assert rights within a reasonable time.
13. Lapse of time, though not a sufficient prohibition to constitute a statutory bar, may, if circumstances warrant, so operate by way of evidence as to create a presumption that the parties have waived or abandoned their rights; and in this connection the fact that during the delay one of the parties died should have its proper bearing.
14. A written contract by which the owner of the minutes of pine lands agrees to select therefrom and locate from 5,000 to 10,000 acres in the name of his co-contractor, who agrees to furnish the necessary means for that purpose, and to give to the first party an undivided one-fourth part of the lands so located, which contract has been executed except as to the conveyance of said interest, creates an equitable interest in the land which vests in said first party, and cannot be released or surrendered except by writing signed by him, or by the act or operation of law; citing How. Stat. § 6179; *Seligman v. Ten Eyck Estate*, 60 Mich. 267; *Whiting v. Butler*, 29 Id. 122; *McEwan v. Ortman*, 34 Id. 325.
15. An agreement by the second party to such a contract to furnish the money to pay the expenses and taxes is held to have been for the benefit of both parties, it not being a part of the consideration moving to the first party, and in a suit by him to enforce the trust arising out of said contract he should be charged with his proportion of the taxes paid.

Appeal from Chippewa. (Steere, J.) Argued June 9, 1891. Decided October 30, 1891.

Bill to declare a trust in lands. Defendant appeals. Decree modified and affirmed. The facts are stated in the opinions.

John A. Combs (*Hanchett, Stark & Hanchett*, of counsel), for complainant, contended:

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1. The contract is produced by Mr. Ripley, and is thus shown to be in his possession, and this is evidence of its delivery to him; citing *Patrick v. Howard*, 47 Mich. 40, 46; *Seligman v. Ten Eyck Estate*, 49 Id. 104, 109, 110; *Foster v. Hill*, 55 Id. 548.

2. It was the defendant's privilege to waive the objection that the facts were equally within the knowledge of Buckland, if such objection existed, and he is held to waive it unless the objection is made when the evidence is given; citing 1 Greenl. Ev. § 421; *Perrott v. Shearer*, 17 Mich. 48, 53; *Locke v. Farley*, 41 Id. 405–407; *Donelson v. Taylor*, 8 Pick. 390, 392; *Levin v. Russell*, 42 N. Y. 251, 255, 256.

3. In support of the claim that Buckland held the title to an undivided one-quarter of the lands in trust for complainant, counsel cite How. Stat. § 5573 (subd. 5); 1 Perry, Trusts, §§ 82, 112; 2 Story, Eq. Jur. § 972; *Patton v. Chamberlain*, 44 Mich. 5, 6; *Compo* v. *Iron Co.*, 49 Id. 39; *Chadwick v. Chadwick*, 59 Id. 87, 92; *Cummings v. Corey*, 58 Id. 494, 502; *Loring v. Palmer*, 118 U. S. 321, 339, 344; *Culbertson v. Witbeck Co.*, 127 Id. 326, 334, 335; *Pinch v. Anthony*, 8 Allen, 536, 539; *Seymour v. Freer*, 8 Wall. 202, 213, 214; and equity will enforce such trust: citing 2 Perry, Trusts, § 816; 2 Story, Eq. Jur. § 979; *Inches v. Hill*, 106 Mass. 575, 578; *Stone v. Hackett*, 12 Gray, 227; *May v. LeClaire*, 11 Wall. 217, 236; and complainant may follow the trust property into the hands of the defendant, and enforce the trust against him; citing 1 Perry, Trusts, § 217, 2 Id. § 828; *Oliver v. Piatt*, 3 How. 333, 401; *Seymour v. Freer*, 8 Wall. 202, 215; *Pinch v. Anthony*, 8 Allen, 536, 539.

4. Actual payment of the consideration, which must be a valuable one, made in good faith before notice, is necessary to constitute a *bona fide* purchaser so as to discharge lands from a trust; citing *Dixon v. Hill*, 5 Mich. 404, 409; *Kohl v. Lynn*, 34 Id. 360; *Haescig v. Brown*, Id. 503; *Webster v. Bailey*, 40 Id. 641; 1 Perry, Trusts, §§ 219–221.

5. The burden of proving an actual payment of a valuable consideration is cast upon the party who claims as a *bona fide* purchaser, or under a *bona fide* purchaser, and the proof should be clear and convincing where the title sought to be sustained arises through a fraud; citing *Berry v. Whitney*, 40 Mich. 65, 71; *Letson v. Reed*, 45 Id. 27; *Atwood v. Bearss*, Id. 469, 474.

6. Aside from any question of notice or payment of consideration, the defendant is not a *bona fide* purchaser, because the deeds to him are quitclaim deeds, and the deed from Buckland to Mrs. Seligman is a quitclaim deed; citing *Peters v. Cartier*, 80

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Mich. 124; *May v. LeClaire*, 11 Wall. 217, 232: *Villa v. Rodriguez*, 12 Id. 323, 338, 339; *Dickerson v. Colgrove*, 100 U. S. 578, 584; *Baker v. Humphrey*, 101 Id. 491, 499; *Watson v. Phelps*, 40 Iowa, 482; *Smith v. Dunton*, 42 Id. 48; *Springer v. Bartle*, 46 Id. 683, 690; *Postel v. Palmer*, 71 Id. 157, 159; *Runyon v. Smith*, 18 Fed. Rep. 579, 582; *U. S. v. Sliney*, 21 Id. 894; *Martin v. Morris*, 62 Wis. 418, 428.

7. The interest which complainant had in the lands was a vested interest, an interest by contract, an equitable title. To surrender or release that interest would require an instrument in writing; citing How. Stat. § 6179; *Seligman v. Ten Eyck Estate*, 60 Mich. 267, 276; *Whiting v. Butler*, 29 Id. 122, 144; *McEwan v. Ortman*, 34 Id. 325.

8. The title to the land was held by Buckland in trust for Ripley, and the statute of limitations does not begin to run, and there are no laches, in the case of a trust, until it has been repudiated by the trustee; citing 2 Perry, Trusts, §§ 863, 864; 2 Story, Eq. Jur. § 1520*a*; Busw. Lim. §§ 341, 342; *Oliver v. Piatt*, 3 How. 333, 411; *Seymour v. Freer*, 8 Wall. 202, 218; *Carpenter v. Cushman*, 105 Mass. 417, 420; *Albretch v. Wolf*, 58 Ill. 186, 190; *Middletown v. Newport Hospital* (R. I.), 15 Atl. Rep. 800.

9. The contract recognizes and refers to the minutes of land in the Upper Peninsula, which Ripley then has, which minutes may be identified by parol testimony; citing 1 Benj. Sales, §§ 211, 221; *Kimball v. Myers*, 21 Mich. 276, 285; *Slater v. Breese*, 36 Id. 77, 80, 81; *McCreery v. Green*, 38 Id. 172; *Crooks v. Whitford*, 47 Id. 283, 286; *Harrison v. Ingersoll*, 56 Id. 36, 38; *Adams v. Morgan*, 150 Mass. 143 (22 N. E. Rep. 708); *Beckwith v. Talbot*, 95 U. S. 289, 292; *Oliver v. Insurance Co.*, 82 Ala. 417 (2 Sou. Rep. 445); *Barry v. Coombe*, 1 Peters, 640, 653; *Thornell v. Brockton*, 141 Mass. 151, 153; *Owen v. Thomas*, 3 Mylne & K. 353; *Ball v. Benjamin*, 73 Ill. 39, 41; *Swett v. Shumway*, 102 Mass. 365, 368; *Stoops v. Smith*, 100 Id. 63, 66; *Atkinson v. Cummins*, 9 How. 479, 486; *Thorington v. Smith*, 8 Wall. 1, 12.

10. Performance may be shown by parol evidence; citing *Stearns v. Hall*, 9 Cush. 31, 34, 35; *Kimball v. Myers*, 21 Mich. 276, 285, 286.

11. Whatever the motive, the objection not being made on the ground of incompetency, the testimony stands as competent; citing 1 Greenl. Ev. § 421; *Perrott v. Shearer*, 17 Mich. 48, 53; *Locke v. Farley*, 41 Id. 405–407; *Levin v. Russell*, 42 N. Y. 251, 255, 256; *Donelson v. Taylor*, 8 Pick. 390, 392.

12. The objection that some of the testimony given by Ripley was

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equally within the knowledge of Buckland has no other force than to require such testimony to be disregarded when objected to; citing *Smith's Appeal*, 52 Mich. 415.

13. The refusal to answer on cross-examination only affects so much of the direct testimony as the answer withheld might have qualified; citing *Heath v. Waters*, 40 Mich. 457, 471.

Wisner & Draper, for defendant, contended:

1. As to the incompetency of portions of complainant's testimony under the statute, counsel cited *Kimball v. Kimball*, 16 Mich. 211; *Stackable v. Stackable Estate*, 65 Id. 515; *Buffum v. Porter*, 70 Id. 623.

2. By the terms of the so-called "contract," Ripley, before he is entitled to a conveyance of the quarter interest, must pay his proportion of the taxes and expenses attending the keeping of the lands. In his bill he makes no averment of his readiness or willingness or of an offer to do this, nor does he refer to the matter by any evidence put into the case, nor does the decree require him to do this, but simply gives him the land unconditionally; citing Pom. Cont. § 823.

3. The contract, being one for an interest in lands, is void, as it fails to describe the lands in which complainant claims a quarter interest; citing How. Stat. §§ 6179, 6180; and, treated as a declaration of trust, it is equally void for the same reason; citing How. Stat. §§ 5573 (subd. 5), 6179.

4. Trusts in land by parol cannot be created in Michigan; citing *Taylor v. Boardman*, 24 Mich. 302; *Shafter v. Huntington*, 53 Id. 310.

5. That his contract is void under the statute of frauds cannot be doubted; citing *Raub v. Smith*, 61 Mich. 543; *Brosnan v. McKee*, 63 Id. 454; *Yerkes v. Perrin Estate*, 71 Id. 567.

6. As to the admissibility of parol evidence, see 1 Greenl. Ev. § 268; *Cook v. Barr*, 44 N. Y. 156; *Gault v. Stormont*, 51 Mich. 636; *Webster v. Brown*, 67 Id. 328; *Johnson v. Buck*, 35 N. J. Law, 338 (10 Amer. Rep. 243); *O'Donnell v. Leeman*, 43 Me. 158; *Hurley v. Brown*, 98 Mass. 545; *Scanlan v. Geddes*, 112 Id. 15; *Doherty v. Hill*, 144 Mass. 465 (11 N. E. Rep. 581); *Wright v. Weeks*, 25 N. Y. 153; *Brodie v. St. Paul*, 1 Ves. 326; *Ridgway v. Ingram*, 50 Ind. 145; *Palmer v. Albee*, 50 Iowa, 429; *Tice v. Freeman*, 30 Minn. 389 (15 N. W. Rep. 674); *Jordan v. Fay*, 40 Me. 130.

7. That this writing is void for want of sufficient description, see Pom. Cont. § 152; *Eggleston v. Wagner*, 46 Mich. 610; *Beekman v. Fletcher*, 48 Id. 555; *Tice v. Freeman*, 30 Minn. 389;

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Brockway v. Frost, 40 Id. 155 (41 N. W. Rep. 411); *Taylor v. Allen*, Id. 433 (42 N. W. Rep. 292); *Mellon v. Davison*, 123 Penn. St. 298 (16 Atl. Rep. 431); *Wilstach v. Heyd*, 122 Ind. 574 (23 N. E. Rep. 963); *Jordan v. Fay*, 40 Me. 130; *Hamilton v. Harvey*, 121 Ill. 469 (13 N. E. Rep. 210).

8. Complainant's long and unexplained delay in bringing his suit is fatal to his right to relief, even if originally perfect; citing *Bruce v. Tilson*, 25 N. Y. 194; *Peters v. Delaplaine*, 49 Id. 367; *Campau v. Van Dyke*, 15 Mich. 371; *Loomis v. Brush*, 36 Id. 41; *Zoellner v. Zoellner*, 46 Id. 511; *Allen v. Allen*, 47 Id. 74; *Haff v. Haff*, 54 Id. 511; *Bangs v. Stephenson*, 63 Id. 661; *Day v. Cole*, 65 Id. 154; *Combs v. Scott*, 76 Wis. 662 (45 N. W. Rep. 532); *Van Houten v. Van Winkle*, 46 N. J. Eq. 380 (20 Atl. Rep. 34); *Wilkinson v. Sherman*, 45 Id. 413 (18 Atl. Rep. 228); *Larison v. Polhemus* (N. J.), 5 Atl. Rep. 129; *McCartin v. Traphagen*, 43 N. J. Eq. 323 (11 Atl. Rep. 156).

CHAMPLIN, C. J. This suit is brought to enforce a trust under a contract of date May 9, 1870, made between the complainant and Don C. Buckland, and which is in the following terms:

"This agreement, made this ninth day of May in the year of our Lord one thousand eight hundred and seventy, by and between Marcus T. Ripley, of Pontiac, the party of the first part, and Don C. Buckland, of Pontiac, State of Michigan, of the second part, witnesseth:

"Whereas, the said first party has the minutes of a large amount of pine lands on the Upper Peninsula of Michigan, and said second party is desirious of locating a portion of said land on shares:

"It is hereby agreed that said first party, for and in consideration of sufficient money and land-warrants to locate from five to ten thousand acres of said land, and in consideration of a one-fourth part of said land when located, agrees to select from said minutes from five to ten thousand acres of the best pine land, and locate the same in the name of Don C. Buckland, as soon as said second party shall furnish him the money and land-warrants to locate said land.

"And said second party hereby agrees to furnish said first party sufficient money and land-warrants to locate from five to ten thousand acres of said land; and said second party hereby agrees to give said first party an undivided one-fourth part of all lands selected by said

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first party, and taken or located in the name of Don C. Buckland.

"Said first party agrees to look after the land, and attend to lumbering it or selling it, as the parties may agree. Said second party agrees to furnish the money to pay the expenses and taxes.

"M. T. RIPLEY.
"D. C. RUCKLAND."

The bill of complaint states that—

In pursuance of this contract the complainant selected from the minutes of land which he then had the descriptions contained in the third paragraph of the bill of complaint, which appear on pages three and four of the record, and located the lands; that the location was made in the name of Don C. Buckland, in May and June, 1870; that patents were afterwards issued for the lands to Don C. Buckland.

That on the 1st day of November, 1880, Don C. Buckland and wife, upon the recited consideration of one dollar and of love and affection, quitclaimed the whole or a portion of said lands to May E. Seligman, wife of the defendant and daughter of Don C. Buckland; that afterwards, on the 10th day of May, 1881, May E. Seligman, upon the recited consideration of one dollar and of love and affection, made a conveyance of said lands to the defendant, Jacob Seligman; that afterwards, and on the 24th day of October, 1885, Don C. Buckland and his wife, upon the recited consideration of one dollar, quitclaimed to the defendant certain specified descriptions of land, being the same lands, in whole or in part, which were intended by Buckland to be contained in the deed to his wife, May E. Seligman, which deed contains the following:

"This deed is made to convey the above descriptions, which were omitted by error in deed dated November 1, 1880, executed by D. C. Buckland and Sarah A. Buckland, his wife, to May E. Seligman."

The bill further sets up that Don. C. Buckland died in the month of September, 1888, leaving a last will, which was probated in the probate court of Oakland county on the 15th day of October, 1888; that he left surviving him his widow, who was made executrix of the will, and she, after the death of her husband, executed a

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conveyance of said lands to said Jacob Seligman; that by the conveyance made by Don C. Buckland to his daughter, and through his conveyance to Jacob Seligman, and by means of the will and conveyance made as aforesaid to Jacob Seligman, and the conveyance made by May E. Seligman to Jacob Seligman, the title to all of said lands has become vested in and is held by the said Jacob Seligman.

Complainant charges that Seligman took the conveyances with notice of his rights in the undivided one-quarter of the lands; that the conveyances were made without his assent, and that Jacob Seligman holds the lands in trust for the complainant; that he has requested Seligman to execute to him a deed of the undivided quarter of the lands mentioned in the bill, and he has refused to do so.

He prays that a decree may be made declaring him the equitable owner of and entitled to an undivided one-quarter of the lands described in his bill, and that such undivided one-quarter of said lands is held in trust by Seligman for the complainant, and that said trust be declared and established, and Seligman decreed to convey the undivided quarter of the lands to complainant, or that the whole lands be sold, and the proceeds divided, if that shall be for the greater mutual advantage of the complainant and Seligman.

The defendant, Jacob Seligman, answered the bill of complaint, in which he denied all knowledge of the agreement set forth, and says—

That for more than 15 years past preceding the death of said Buckland he was on intimate terms with him, both socially and in business matters; that they transacted a very large amount of business together, relating to pine lands in the Upper Peninsula of Michigan, and in all his dealings and intercourse with him he never heard that any such agreement was outstanding, or that complainant had any interest in any of the lands described in the bill, and says that whatever interest complainant had in such lands originally was fully settled for and adjusted between the complainant and Buckland many years before Buckland died; that complainant knew that Buckland had deeded an undivided interest in said lands to May E. Seligman, the defendant's wife, but at no time prior

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to Buckland's death did he claim or intimate to defendant or to May E. Seligman that he had any interest in any of said lands, notwithstanding he saw the defendant several times a year for a good many years before Buckland died. That in November, 1880, Buckland sold and conveyed to the defendant's wife, May E. Seligman, an undivided half of said lands, on consideration that she would pay the taxes on all of them for the future; that the defendant, for her, has ever since the year 1880 paid the taxes, amounting to upwards of $4,000; that the wife of defendant was a *bona fide* purchaser of the half of said lands, and at no time until after the death of her father did she know or hear of the complainant's having or claiming to have any interest in any of said lands; that the deed to her was recorded January 24, 1884; that on the 26th of January, 1884, she conveyed an undivided half of said lands to defendant, in consideration of the taxes he had paid thereon, and to enable him to handle and dispose of said lands; but at the time he paid such taxes, and at the time he received said deed, and at no time since, until after the death of Buckland, did he know or hear in any way that the complainant claimed an interest in any of said lands.

That, after Buckland had so deeded an undivided half of said lands to his daughter, he remained owner of the other undivided one-half, and by his last will and testament he devised that half to his wife; that he died in September, 1888; that his will was probated, and on the 8th day of November, 1888, defendant purchased of Sarah A. Buckland, the wife of said D. C. Buckland, the other undivided one-half of said land, paying therefor upwards of $15,000, and at the time he so purchased and paid he did not know or have any notice, nor did he even hear, that complainant claimed any interest in said lands, and he denies that he has any.

The defendant submits that he is a *bona fide* purchaser of said lands, and holds the same free from any right of complainant thereto by reason of anything contained in said contract, even if said complainant and said Buckland had not discharged and adjusted the matter long ago; and he claims that whatever rights and interests complainant may have had in such lands, if any, at some time prior to the death of Buckland, he cannot now at this late day assert any claim thereto as against the defendant, but must be left to his remedy, if he has any,

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against the estate of said Buckland, which is entirely solvent; that the long and unexplained laches and delay on the part of the complainant in claiming any interest in said lands or in asserting the same during the life-time of said Buckland is a complete answer to the claim that said complainant has now made; and defendant asks and claims the benefit of the statute of limitations, the same as if he had formally pleaded the same.

The testimony was taken before commissioner, and upon the hearing the court below granted the relief prayed for by the bill.

Upon the hearing of the appeal in this Court, the counsel for the defendant insisted that the first step to be taken was to strike from the record all testimony given by the complainant, as a witness in his own behalf, which, if true, must have been equally within the knowledge of Don C. Buckland, deceased, in his life-time. We fully agree with counsel for defendant, and have laid aside entirely the testimony of the complainant as to all matters which, if true, must have been equally within the knowledge of Mr. Buckland, unless its admission has been waived by defendant.

It is claimed by counsel for the complainant that in several instances defendant has waived the prohibition of the statute by not objecting to the introduction of testimony. While we have held that the representatives of deceased persons could not be permitted to waive the statute,[1] the same reasons do not apply to those who do not occupy that position. Here the defendant represents his own interest, and it is competent for him to waive the provisions of the statute with reference to testimony which would affect his interest. He is entitled to the benefit of the statute, if at all, through the provisions extending it to the assigns of deceased persons. As originally enacted, the statute was confined to suits or

[1] See *McHugh v. Dowd Estate*, 86 Mich. 412.

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proceedings prosecuted or defended by the representatives of a deceased person or by any surviving partner. Act No. 125, Laws of 1861; Act No. 188, Laws of 1863. By the amendment of 1875 (Act No. 155) the statute was extended so as to include heirs, assigns, devisees, and legatees, and it so remains at the present time. The word "assigns" is used here in its legal sense, and signifies a person to whom any property or right is transferred by a deceased person in his life-time. The statute is broad enough to cover successive transfers, or where the controversy depends upon the acts or dealings with the property of the deceased in his life-time; and any one who is called upon to prosecute or defend some interest which is affected by the act or agreement of the deceased party through whom he claims may invoke the protection of the statute to shield his interest from the testimony of the opposite party to matters which, if true, were equally within the knowledge of the deceased person through whom he claims.

In *Twiss v. George*, 33 Mich. 253, it was said that the prohibition did not extend to controversies with third persons acting in their own right as purchasers during the life-time of the deceased, and not taking by *post mortem* estate. This case, although decided after the amendment of the statute of 1875 took effect, arose under the statute as it read before, and cannot be taken as an exposition of the present law. Seligman is the transferee of the decedent, of the assign of the decedent, and of the devisee of the decedent, as is shown by his respective title deeds; and although the estate of Buckland cannot he held liable to him, for the reason that he took only such estate as his grantors had by his quitclaim deed, yet the complainant is seeking to charge him, as the representative of Buckland, with the same trust which he alleges Buckland assumed; and the case should be governed

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in all respects, if he is chargeable at all, as Buckland would be had the suit been against him in his life-time. Hence all testimony given by Ripley in his own behalf, of matters which, if true, were equally within the knowledge of Buckland, was not admissible, and must be stricken out. This will include all personal interviews between Ripley and Buckland, all *memoranda* of conversations between Ripley and Buckland, all money transactions he had with him, as to letting him have the minutes of the land, as to working for Buckland on the Au Sable river, and as to Buckland's handwriting.

In applying this statute, care should be observed in distinguishing between matters equally within the knowledge of the deceased and matters within his information; that is, to distinguish what is knowledge and what is hearsay. It is only as to matters within the knowledge of the deceased that the opposite party is not permitted to testify. This is illustrated in *Wheeler v. Arnold*, 30 Mich. 304, 308, where it was said that—

"Most of the facts sought to be introduced by his testimony related to what was done in the absence of the deceased, including the forwarding or removal of property destined for his use, he being in Texas, and the transactions being confined to occurrences in Michigan, and on the way between the two states. Some testimony referred to the value of property and transportation. These matters could not, for the most part, be known to deceased at all, and his only information must have been hearsay. It is not, therefore, necessary to go into any examination of the statute, which can not possibly apply to such facts."

This principle applies to the testimony of Ripley with reference to his acts in purchasing warrants and scrip to enter the land at Marquette and Lansing. Buckland had no personal knowledge of these matters. He was not present. These are distinct facts, which it was just as competent for Ripley to testify about as that the United

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States Land Office is located at Marquette, and the seat of the State government at Lansing. A report of the lands located, made by Ripley to and received by Buckland, is not admissible. The statement of Ripley that he selected these lands from his lists, went to Fisher, Booth & Co., and selected warrants and scrip, was admissible, but the statement that Mr. Buckland settled for them is stricken out; also is that part of his testimony where he states that Buckland paid for the warrants and scrip, and settled with the bank for them; also the statement that he had Mr. Buckland send a letter, which he wrote, to the State Land Office at Lansing. The testimony of *memoranda* made by Ripley, introduced in his own behalf, is eliminated, as well as the testimony introduced on the part of the defendant to the effect that the witness had heard Mr. Buckland say that he and Ripley had settled all their pine-land affairs. The testimony of Ripley with reference to his money transactions with Buckland is stricken out.

We see no impropriety in the refusal of Ripley to answer some questions relative to the agreement he made, if any, concerning the prosecution of the suit.[1]

At first I was inclined to think that it was not competent for Ripley to testify to having seen the patents of the lands which he had entered, while at Buckland's house, showing them to have been in his possession; but upon more careful consideration of what was said by this Court in *Wright v. Wilson*, 17 Mich. 201, I am inclined to think that the statute was not intended to exclude testimony concerning facts capable of proof by document-

[1] Complainant was asked on cross-examination if he had made any arrangement of any kind with any person to carry on this suit for a share of what he might recover, or by which any other person than himself should pay the whole or any part of the expenses of the litigation, which inquiries were objected to as immaterial and irrelevant, and under the instructions of his counsel the witness declined to answer.

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ary evidence which is accessible to both parties, as, for instance, the dates or contents of instruments in writing of a public character, where such testimony is not excluded under other rules for the admission of testimony. The patents were public records, and their existence and contents could have been proved from certified copies from the archives of the departments at Washington and Lansing. The fact is not denied that Buckland was the patentee, and, the fact being proved by competent testimony that the agreement was made as alleged, that the lands were selected and located and the patents issued in Buckland's name, the inference is conclusive that the patents were issued under and in accordance with the agreement set out, and competent testimony in the case establishes this.

The first question involving the merits is whether the writing of date May 9, 1870, is void under sections 6179 and 6180 of Howell's Statutes. These sections read as follows:

"SEC. 6179. No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by some person thereunto by him lawfully authorized by writing.

"SEC. 6180. The preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law."

The reason claimed by the defendant for the agreement being void is:

"This instrument of May 9 entirely fails to describe the lands which are the subject-matter of the trust, and

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in no possible way can the lands be ascertained, either from this instrument or from any other referred to in or by it. It is only by the aid of parol evidence (and that, too, from a witness disqualified from testifying by reason of the death of the so-called 'trustee') that the lands referred to could be ascertained. As we understand the law, parol evidence cannot be allowed. Trusts in lands by parol cannot be created in Michigan."

This contract does not declare a trust. There is no express trust. Upon its face it has simply the elements of an executory contract. The complainant claims it has been executed on his part, and upon Buckland's part so far as he received the patents in his own name, and out of these arises the trust in his favor by implication of law. The trust which the law implies is that, having agreed that the title of the lands selected and located shall be taken in Don C. Buckland's name, and he having agreed to give to Ripley an undivided one-fourth of all the lands selected, taken, and located in his name, it was his duty to convey an undivided one-fourth to Ripley, and until he does so the law implies that he holds the title to such undivided one-fourth in trust for Ripley. 1 Perry, Trusts, §§ 82, 112, 122. It is claimed, and the proof shows, that the contract was fully performed in Buckland's life-time, except as to giving, or, which is equivalent, conveying, an undivided one-fourth of the lands to Ripley. This being so, it is useless to speculate upon what would have been the respective rights of the parties had either party refused to carry out his part of the agreement. Had Ripley selected the lands, and Buckland had refused to go further and furnish the money, Ripley might not have been able to compel a specific performance, or, if Ripley had refused to select, Buckland might not have been able to compel a specific performance; but either party would have had

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a remedy at law for damages for non-performance of the contract. *McCreery v. Green,* 38 Mich. 172. Implied and resulting trusts are expressly saved by our statutes, except in cases arising under section 5569 of Howell's Statutes. See, also, sections 5568 and 6180. The latter section declares that the preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law. Section 5572 declares that—

"No implied or resulting trust shall be alleged or established to defeat or prejudice the title of a purchaser for a valuable consideration, and without notice of such trust."

In construing the language of the statutes together, implied or resulting trusts may be established by proving the transaction out of which they result or are implied, and such proof may be by parol testimony. See, also, 1 Perry, Trusts, §§ 137, 139.

The next question to be considered is whether defendant is a *bona fide* purchaser, for, if he is, the statute declares that no implied or resulting trust shall be alleged or established to defeat the title of a purchaser for a valuable consideration, and without notice of such trust. The burden of showing that defendant is a *bona fide* purchaser without notice rests upon him. The sources of his title have already been mentioned. The deed from Mr. Buckland to his daughter was by quit-claim, and in consideration of one dollar and of love and affection. The considerations recited in deeds are not sufficient evidence to show the consideration upon which a party can rely when he has the burden of proving that the consideration paid was valuable in a suit between the

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grantee and third persons. It is, moreover, contended that Seligman, having acquired title by quitclaim deed, is not entitled to rely upon the claim that he is a purchaser for value without notice of the trust, under the decision in the case of *Peters v. Cartier*, 80 Mich. 124. It may be remarked, however, that the case of *Peters v. Cartier* arose under the recording laws, and is, therefore, authority only in cases arising under such laws. The recording laws are not involved here, nor are they involved in section 5572, above quoted; and I think it was competent for the defendant, if he could, to show that he was a purchaser for a valuable consideration and without notice of the trust.

The conveyance from Buckland to his daughter appears to have been voluntary, and she must be held to have taken it subject to the trust which by implication of law attached to it in the hands of Buckland. We have duly considered the position taken by defendant's counsel with reference to the clause conditioned for the payment of the taxes, and we consider that as a condition subsequent, and not as the valuable consideration referred to in the statute.[1] The conveyance from Mrs. Seligman to her husband was likewise voluntary, and the subject of the trust in his hands. The devise to Mrs. Buckland gave her no greater rights than Buckland had. She was not a *bona fide* purchaser for a valuable consideration. *Burns v. Berry*, 42 Mich. 176. Defendant claims to have purchased from her for a valuable consideration without notice. He testified that he paid Mrs. Buckland $30,000 for her interest, and the witness Emerick testified to the

[1] The clause referred to is found in the quitclaim deed from Buckland and wife to their daughter, May E. Seligman, and reads as follows: "This conveyance is made, however, upon the express conditions that the said party of the second part shall pay or cause to be paid, in due season, the whole amount of all taxes assessed upon the whole of the above-described lands," excepting those lying in certain designated townships.

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same thing. Emerick's testimony is not very satisfactory when read in the light of his cross-examination; and defendant's testimony is not entirely consistent with his answer, in that he states therein that he paid Mrs. Buckland upwards of $15,000. One would hardly suppose that upwards of $15,000 signifies the same thing as $30,000; and yet the greater sum would include the less, and if he gave her $15,000 it would be a valuable consideration. The difficulty with me, in reference to this purchase, is to determine whether Seligman, at the time of the purchase, had notice of Ripley's rights under the contract. Upon this the testimony is conflicting, and the circuit judge must have determined the weight of evidence to have been with the complainant; and it does not so clearly preponderate in defendant's favor as to convince us that the circuit judge was wrong, and therefore we are inclined to hold that Seligman was not ignorant of Ripley's rights when he purchased.

We now come to the question of complainant's laches. Lapse of time alone is not sufficient to bar equitable relief. This is illustrated by several cases cited by counsel for the complainant. The term "laches" involves the idea of negligence,—a neglect or failure to do what ought to be done under the circumstances to protect the rights of the parties to whom it is imputed, or involving injury to the opposite party through such neglect to assert rights within a reasonable time. In applying the principle of laches to Ripley we must consider what the object of the contract was, and whether there was anything in the nature of the circumstances which called upon him to act within any particular time. The contract had been so far executed as to secure the lands and place the whole title in Buckland. The agreement is silent as to the time when Buckland should give to Ripley a deed of an undivided quarter. It was his duty

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to give the deed on demand or within a reasonable time. The duty of acting was Buckland's. If Ripley did not choose to call upon Buckland to perform, he alone ran the risk of the betrayal of confidence by sale of the whole land to an innocent purchaser; or did Buckland's neglect to deed make it negligence in Ripley to delay? On the other hand, Ripley says it was not intended to sell the lands at once, but to hold them for a future rise in value. Why, then, should he not at once call for his deed, and thus avoid the risk of Buckland's death or his own, or of Buckland's repudiation of the trust? Would prudent men have been guilty of so long a delay?

Letters and postals were introduced, all of them bearing date after the patents were in Buckland's hands and Ripley was entitled to his one-fourth interest. The first was written at Detroit, May 29, 1872:

"DETROIT, MICH., May 29, 1872.

"M. RIPLEY, ESQ.,—

"*Dear Sir:* I have heard for the last three weeks that you were back, and have tried to find you, but could not. Now, I want to see you very much. I have not taken those lands, because I dare not, from what I heard, etc.; and I thought you acted very strange towards me. I have endeavored to befriend you in every way, and you seem to shun me. If there is anything wrong, I wish to know it at once. I thought if you went to the woods you would find something, and I would help you to save it; but you seem to give me a wide berth. Please call or write me the next 6 days to N. Y., Astor House.

"Yours truly,

"D. C. BUCKLAND."

It is not shown what reply Ripley made to this letter. If, as Buckland seemed to think, Ripley appeared to shun him, what would have been more natural than for him to request Buckland to deed according to the contract? Buckland tells him what he thought he would do for him if he went into the woods, but does not mention what he had already done for him. We must read that

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letter in the light of what we are satisfied are the facts that existed at the time, namely, that they had just closed a deal by which Buckland held the title to a large quantity of land, of which Ripley was entitled to a deed of an undivided quarter, and yet no allusion is made to it. Would not Ripley have regarded it as a strange circumstance, and grown more suspicious of him? Yet at that time the parties had other dealings with each other. Buckland then held three notes against Ripley,—one for $200, one for $740.20, and one for $1,000, all long past due. A postal-card, written August 15, 1876, to Mr. Galloway, says:

"*Dear Sir:* Yours received. Mr. Ripley has just gone up to the 'Soo.' If you go up you will find out from his brother where Mark Ripley is. He knows all my lands. He located them. If you want to buy, you better come down here.

"D. C. BUCKLAND."

On April 3, 1877, the parties met, and in some way Ripley paid the $1,000 note, and on that day gave to Buckland the following receipt:

"Rec'd of D. C. Buckland one dollar, in full settlement for all acc'ts for expenses in looking lands to date, having settled with him this day in full, and executed to him my note for $1,636.94, for borrowed money.

"M. T. RIPLEY.

"*Pontiac, April* 3, 1877."

This receipt, as originally drafted, was "in full settlement of all acc'ts for expenses in looking lands and all other matters to date;" and as it now appears the words "and all other matters" are canceled by a line being drawn through them. After the date of that receipt we have communications by way of postal-cards, introduced in evidence by complainant, as follows:

"PONTIAC, Sept. 14, 1878.

"*Dear Sir:* Why don't you write me about my matters

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up there? If you can do anything, please say so; and, if not, say so. I rec'd a letter from Mathews & Longyear, of Marquette, wanting the agency of my lands. What do you think of them? They say they can sell.

"D. C. BUCKLAND."

"PONTIAC, Sept. 16, 1878.

"What is the reason you do not answer my letters? I have written 3 on business, and no answer. Unless I hear from you soon, I must come up there, for I must get my matters in shape at once. Please write me fully on rec't of this.

"D. C. BUCKLAND."

"PONTIAC, Sept. 27, 1878.

"*D'r Sir:* Unless I can hear from you immediately, I must come up there. I must have my matters fixed up. Why don't you answer some of my letters? Are you coming down soon? Please write at once. I wrote Mr. Seymour about cutting timber on my land.

"D. C. BUCKLAND."

The foregoing postal-cards were all addressed to "M. T. Ripley, Esq., Sault Ste. Marie, Mich."

"PONTIAC, Dec. 7.

"Come to Pontiac Saturday,—to-morrow,—and I will be at home.

"D. C. BUCKLAND."

This postal, and the one following, were addressed to Ripley at Detroit.

"PONTIAC, April 8.

"*D'r Sir:* I have been trying to find you, and wish to see you before you go up the lakes. Write me when I can see you in Detroit, and I will come in. Yours,

"D. C. BUCKLAND."

There is a date on the face of this card, 1879.

In November, 1880, Buckland conveyed to his daughter an undivided half of this land, which deed was not recorded until January 24, 1884. In looking over all the exhibits since the date of the contract, I find none which recognizes the fact or mentions an existing interest in the land as belonging to Ripley. Buckland speaks of it

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as his land. Whether he refers to this exclusively, or to other, which the testimony shows he owned in the vicinity of this, does not appear. The deed to May E. Seligman embraces a large amount of lands other than those which complainant claims an interest in; but granting, as we must, I think, that the exhibits refer to these lands,—for this view would be most strongly against the complainant,—we are to consider whether they show acquiescence in the claim made by the defendant that Ripley, if he ever had an interest, had abandoned it, and all claim to it. Lapse of time, though not a sufficient prohibition to constitute a statutory bar, may, if circumstances warrant, so operate by way of evidence as to create a presumption that the parties have waived or abandoned their rights; and in this connection the fact that during the delay one of the parties died should have its proper bearing. There is no competent evidence that Buckland ever denied the rights of Ripley under the contract; there is none that he ever repudiated the trust; and, looking to his acts and dealings with the land, we see that by a deed dated in 1880 he conveyed an undivided half to his daughter. This was not placed upon record until 1884. From this time it was constructive notice to Ripley, but that act did not in any way militate against the trust. He could still have deeded to Ripley an undivided quarter. Consequently this act cannot be regarded as of any significance as showing a design to repudiate the contract, or as ending his trust relations with Ripley. Complainant was not then called upon to assert his claim by reason of that act of Buckland. The devise of the remaining undivided half to his wife was a direct repudiation of his trust, but this did not take effect until his death, and was an act of which Ripley had no previous notice.

Complainant's delay to bring suit until after the

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decease of Buckland was not, in and of itself, such laches, when viewed in the light of the object and purposes of the contract, as to create a presumption that he had abandoned his rights under it. No sale had been made by the agreement of the parties. The land had not been lumbered by mutual agreement. It was becoming more valuable year by year until the time of Buckland's death, as may be inferred from the testimony of the defendant, who says he paid to Mrs. Buckland $30,000 for the undivided half after the death of Buckland, from which we may conclude that the whole tract was at that time worth $60,000. The rise in value was what the parties contemplated when they entered into the contract and located the land at government price. Should this delay and Buckland's death preclude the relief sought? Has testimony been lost to the defendant by the delay? It is possible that Buckland would have denied that Ripley ever had any interest in the land, or, if he had, that it had been relinquished and surrendered; but verbal denial would not have sufficed. The written contract, executed as it was, created an equitable interest in the land which was vested in Ripley, and this could not be released or surrendered except by writing signed by him, or by the act or operation of law. How. Stat. § 6179; *Seligman v. Ten Eyck Estate*, 60 Mich. 267; *Whiting v. Butler*, 29 Id. 122; *McEwan v. Ortman*, 34 Id. 325. No such written evidence was produced. It is not seen how the death of Buckland prejudiced the defendant. It rather operated to the disadvantage of the complainant, in excluding testimony which he cannot now give, by reason of Buckland's death.

The testimony shows that Ripley made efforts to sell the land during the year 1887, which was prior to Buckland's death, and had interviews with defendant respecting such sale, and also advised with attorneys respecting

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the bringing of a suit against Buckland to enforce his rights under the contract. In view of all the circumstances, we think complainant ought not to be debarred from relief on the ground of laches.

Upon one point we think the decree of the court below was wrong. The contract contains this clause:

"Said second party agrees to furnish the money to pay the expenses and taxes."

This agreement to furnish money to pay taxes and expenses was no part of the consideration moving to Ripley. The contract is clear upon what the consideration was. It says:

"In consideration of a one-fourth part of said land, when located, agrees to select," etc.

The agreement to furnish the money to pay the taxes was for the benefit of both parties. If Buckland had immediately conveyed to Ripley an undivided one-fourth of the land located, he would have been liable to pay one-fourth of the taxes. Equity regards that as done which should have been done, and we think he should bear his proportion of the taxes paid. The decree must be so modified, and, as modified, affirmed. If the parties cannot agree upon the amount, the cause must be referred to a commissioner to take an account of the taxes paid, and upon the coming in of the report a final decree will be entered that, upon the payment of one-fourth of the taxes, the defendant execute a conveyance in accordance with the decree made by the court below. No costs will be allowed to either party in this Court.

McGRATH, LONG, and GRANT, JJ., concurred.

MORSE, J. (*dissenting*). If all the testimony of complainant to matters and things which must have been equally within the knowledge of Buckland were eliminated

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from this case, there would be left nothing in support of his claim, except the existence in his hands of the contract of date May 9, 1870. This contract evidently contemplated that complainant would be entitled to demand and receive the evidence of his one-fourth interest in the lands selected under it as soon as they were located. As soon as the lands were patented to Buckland, complainant was entitled to a deed of a quarter interest in them. Buckland died in September, 1888, solemnly declaring in his last will and testament that he was the sole owner of an undivided one-half of the lands now claimed to be the lands located by the complainant under his contract. The other half Buckland had conveyed to his daughter, wife of the defendant, in 1880; and in 1881 she deeded the same to defendant. The interest in these lands standing in Buckland when he died was devised by him to his widow, who subsequently, for a valuable consideration, in November, 1888, conveyed the same to defendant. After waiting nearly 20 years from the time he was entitled to an enforcement of this contract, complainant files the bill in this cause, praying that he may be declared the equitable owner of one-quarter of a large lot of lands, and that the defendant may be compelled to convey to him such interest. As a majority of the Court are in favor of giving relief to complainant, I do not think it necessary to review the evidence in the case, but will briefly state my reasons for dissenting from such conclusion.

1. This is a stale claim. One of the parties, and nearly every person mentioned by Ripley as having knowledge of the transaction, is dead. Those who are alive, when produced upon the stand, have forgotten all about it, if they ever had any knowledge that would be of use in determining the truth of the controversy. Equity does not look with favor upon such claims. In

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such a case the court ought to be well satisfied from what proofs are obtainable that the complainant is entitled to relief. I am not so satisfied. While Buckland was alive, what correspondence can now be found between the parties tends to show that not only was Ripley making no claims to these lands, but that he was taking no interest in them whatever, and would not even answer the letters of inquiry of Buckland in relation to them.

2. If Ripley ever located these lands under the contract, of which I am not satisfied, it is quite evident to me that the contract was canceled by the subsequent action of the parties long before Buckland's death, and even before the one-half interest was deeded to Mrs. Seligman. In 1877, Ripley and Buckland had a settlement,—at least of some of their matters,—and Ripley gave his note to Buckland for borrowed money. After the time of this settlement Ripley took no further interest in these lands. Although Buckland frequently wrote to him asking for information about them, these letters were never even replied to. This correspondence was put in the case by Ripley, but it indicates, if it shows anything, that Buckland then understood the lands to be his absolutely. Mrs. Buckland testifies that at one time, and after this settlement, while Ripley was at her husband's house in Pontiac, Buckland accused Ripley of not returning a paper, as he agreed, to him, and called him a liar; but she cannot remember anything as to the nature of the paper. This paper may have been the very contract upon which complainant is prosecuting this suit. It is said that this contract, executed as it was, created an equitable interest in the lands which vested in Ripley, and this could not be released or surrendered except by writing signed by him, or by the act or operation of law. But it must be remembered that equity will consider that done which ought to have been done. If Ripley settled

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with Buckland in 1877, and agreed to cancel this contract, he cannot be allowed, in a court of conscience, to come in, 13 years afterwards, and when Buckland is dead, and escape this agreement, and take from Buckland's heirs $20,000 and upwards, upon the technical plea that he ought to have canceled his contract in writing, but did not do so. Courts of equity are not established that parties may profit by their own wrong in this manner.

3. I do not think that the burden of proof is upon Seligman to show that he is a good-faith purchaser of these lands. No fraud on Buckland's part has been shown by the complainant. This whole controversy, if Ripley is right, has grown out of his own neglect and laches. He demanded no deed of Buckland. He did not record his contract, or put it in a shape that it could be recorded. He has paid no attention to these lands, or asserted his interest in any way to them, so as to give notice to the world that he had any right in or to them. He had nothing to say when one-half of them was deeded in 1880 to defendant's wife. He made no claim to the executor of Buckland's estate, or to the widow, to whom the balance was devised, before she sold them to Seligman. He did not look after the taxes. He did not try to sell them, and did not answer the letters that Buckland wrote to him about them. In fact, for 15 years and upwards he has treated these lands in everything as if he was a stranger to them. From the testimony of both parties in the record, I think Mr. Seligman entitled to at least equal credit with Ripley as a witness; and Seligman is corroborated by other persons, while Ripley stands alone.

I have seldom, if ever, examined a case showing the inexcusable laches of this one. It is said that this delay, on account of Buckland's death, puts the complainant at a greater disadvantage than it does the defendant. I

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cannot so regard it. If Mr. Buckland were alive, we should have all the facts on his side as well as Ripley's, and I am satisfied there could be no disagreement as to the rights of the parties in such a case. This is but another instance of cases appearing in the court at every term of old and stale demands prosecuted against the estates or heirs of dead men. The law wisely forbids that, after waiting until the death of a person, a claimant shall be permitted to open his mouth as to facts equally within the knowledge of the deceased. Apply that wise rule in this case, and complainant is out of court for want of proof, as he ought to be on account of his laches, if for want of no other reason.

I cannot concur in all that the Chief Justice has said in relation to what matters Ripley was entitled to give evidence. It was not competent for Ripley to testify that he saw the patents of these lands at Buckland's house, in his possession. This was not proving the existence of the documents; there was a better and proper way of showing that. It was evidence calculated to show that they were shown to him because he had some interest in them, and that was the evident purpose of it. One remarkable thing about Ripley's evidence is that whenever he testifies that he had a conversation about these lands with Buckland or Seligman he supports it by a convenient memorandum of it, which he claims he would make as soon as he got out of sight and hearing of the parties with whom he talked, and that he made it with reference to using it in the future. This does not tend at all to strengthen Mr. Ripley as a witness in my estimation, and such memorandum could not be legally admitted in evidence.

I think complainant's bill should be dismissed.

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WILLARD E. LANGWORTHY v. THE TOWNSHIP OF GREEN.

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95	94

88	207
f122	427
88	207
s95	93
123	390
123	395
88	207
135	1524
88	207
143	1128
88	207
152	2174

Municipal corporations—Defective highway—Personal injuries—Evidence—Error without prejudice.

1. Plaintiff was thrown from his wagon while driving along a highway in defendant township which had been in use for upwards of 15 years. It had been turnpiked so as to form a road-bed from 14 to 16 feet in width at the place where the accident occurred, which was caused by plaintiff driving onto a small log, one end of which was firmly imbedded in the earth, while the other was exposed to view. Plaintiff's leg was broken, and he sustained other injuries, for all of which he recovered a judgment of $700 damages against the township, which is reversed for the following errors:

   a—In permitting plaintiff to show that an overseer of highways of the road district in which the highway was situated cut off the exposed portion of the log *after* the accident, the jury not being instructed that such fact could not be used as an admission on the part of the township of the dangerous character of the obstruction, and that the road was not reasonably safe for travel by reason of its existence; citing *Iron Works v. Kimball Tp.*, 52 Mich. 149; *Lombar v. Village of East Tawas*, 86 Id. 14.

   b—In instructing the jury to ascertain from the evidence if the log was in the condition claimed, followed by the statement that the testimony (which was conflicting) did not vary much in that regard; there being a possibility that the jury may have been misled.

2. The admission of the following testimony offered by plaintiff was not error:

   a—The result of a measurement, made four weeks after the accident, of the size and height of the log from the roadway; it being firmly imbedded in the earth, and the accompanying evidence negativing the probability of a change of situation.

   b—That plaintiff had to hire a man to do his farm work during the term he was laid up on account of the injury.

   c—The opinion of the attending physician as to the probable effects of an injury of the character of that sustained by the plaintiff.

   d—The testimony of two farmers who had worked with

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plaintiff on the farm in the hay-field and at other kinds of labor, both before and after the accident, as to his ability to do as good a day's work since his injury as before.

e—The statement of the plaintiff that he was driving as carefully as a man could, followed by a full description of the manner in which he was driving; the rule being that, where the court or jury can make their own deductions, they shall not be made by witnesses, but, where the witness gives fully and succinctly the facts upon which he bases his conclusion, there is no presumption of prejudice.

3. Plaintiff having testified that he had a conversation with the highway commissioner after the accident, and that he did not state to him that his horses got scared at a calf, and did say that he claimed damages against the township, it was competent to ask him on cross-examination what claim he made to the commissioner; but the error committed in excluding the proffered testimony was cured by allowing defendant afterwards to go fully into the matter.

4. The rejection of the following testimony offered in behalf of the defendant was not error:

a—That the witness had never heard or known of any one being injured on the obstruction before the accident to plaintiff.

b—Of plaintiff's failure to claim damages against the township prior to bringing suit, which was brought within 15 months after he met with the accident.

c—The opinion of witnesses whether the highway at the point where the obstruction existed was dangerous, and whether the log was a dangerous obstruction; these questions being for the jury.

d—How the portion of the road where the accident occurred compared with other portions of the same road in the same township.

e—Plaintiff's manner and method of driving horses, such manner of driving on other occasions being inadmissible to establish his negligence at time of the accident; citing *Williams v. Edmunds*, 75 Mich. 92; *Boick v. Bissell*, 80 Id. 260.

f—Whether plaintiff was a drinking man,—whether he was addicted to the use of liquors; the material question being his condition as to sobriety at the time of the accident.

Error to Mecosta. (Palmer, J.) Submitted on briefs October 9, 1891. Decided October 30, 1891.

Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

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M. Brown and *J. B. Judkins*, for appellant, contended:

1. Plaintiff was entitled to recover whatever his time was worth to him, not what somebody else might charge him to do the work that he was accustomed to do; citing *Huizega v. Lumber Co.*, 51 Mich. 275.
2. The testimony of the attending physician as to the probable effect of the injury, and that if plaintiff had any rheumatic trouble it would be centered in the limb, was incompetent, the rule being that future consequences which are liable to be expected to follow an injury may be given in evidence for the purpose of enhancing damages, but they must be such as in the ordinary course of nature are reasonably certain to ensue, and there being no testimony in this case tending to show that plaintiff had or was liable to have any such trouble; citing *Strohm v. Railroad Co.*, 96 N. Y. 305.
3. Evidence of the claim made to the commissioner in relation to the injury complained of was admissible; citing *People v. Barker*, 60 Mich. 302; *Stewart v. People*, 23 Id. 69.
4. The evidence of the cutting off of a portion of the log after the accident was inadmissible; citing *Iron Works v. Kimball Tp.*, 52 Mich. 149; *Woodbury v. Owosso*, 64 Id. 239.
5. It was competent for witnesses who were familiar with the highway at the place of the alleged obstruction, and had seen the stick many times, to give their opinion whether the road was dangerous on account of its presence and whether the obstruction was a dangerous one, and to state whether they had ever heard it spoken of by any one in the neighborhood as a dangerous obstruction to the highway; citing *Laughlin v. Railway Co.*, 62 Mich. 226; *Evans v. People*, 12 Id. 27; *Beaubien v. Cicotte*, Id. 459; *Railroad Co. v. Van Steinburg*, 17 Id. 99; *Underwood v. Waldron*, 33 Id. 232; *Elliott v. Van Buren*, Id. 49; *Pettibone v. Smith*, 37 Id. 579; *Huizega v. Lumber Co.*, 51 Id. 272.
6. There being a conflict in the evidence as to the condition of the stick, it was error for the court to treat the case as though such conflict did not exist; citing *Weyburn v. Kipp Estate*, 63 Mich. 79; *Hughes v. Railway Co.*, 65 Id. 14.

Dumon & Cogger, for plaintiff, contended for the doctrine stated in head-notes 2 and 4, and further:

1. The sixth assignment of error is based upon the admission of the testimony of Charles Fryburg:

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"*Q.* Whether you have been path-master of that road-district?

"*A.* Yes, sir.

"*Q.* Where that log is?

"*A.* Yes, sir.

"*Q.* What year was that?

"*A.* In 1889.

"*Mr. Brown:* Just wait a moment. If the theory of the plaintiff in that question is that he wants to bind the township by the knowledge of this path-master, I object to the testimony. I object to it as being incompetent and immaterial for the purpose of binding this defendant; in other words, that the township cannot be bound by the action of this witness acting in the capacity of path-master and overseer of highways for a road-district,—one road-district in a township. He is not a township officer, or anything like one.

"*Mr Dumon:* That isn't important enough to have any trouble about. I propose to prove by this witness that he removed a part of that log, and that a part of it had been cut off before. That is all.

"*The Court:* Ask him that question.

"*Mr. Brown:* I object to it; incompetent and immaterial for the reasons stated.

"*The Court:* I will receive it.

"*A.* When I was path-master part of that log was removed.

"*Q.* Whether any part of it had been cut off before that time?

"*A.* Yes, sir.

"*Q.* Do you know who cut it off? I mean of your own knowledge; I don't ask you what you heard anybody else say.

"*A.* Well, my own father cut that off.

"*Q.* How high was the north end of that log before it was cut off above the surface of the road?

"*A.* That I don't know for certain.

"*Q.* You have seen it?

"*A.* I have seen it, but I never measured it.

"*Q.* Well, get at it as near as you can.

"*A.* Well, I should think it was, from the bottom of the ground up to the top of the log, it was all of a foot."

The purpose for which the evidence objected to was introduced is not disclosed by the record, yet it was not for the purpose claimed by the defendant's counsel in their brief. The plaintiff had testified that the portion of the log above the surface of the highway had been cut off, and he had it with him in the city at the time of the trial. The log, if exhibited to the jury, would of itself show how large it was, and the proof by this witness of the fact that it had been cut off corroborates the plaintiff to a certain extent. It was claimed by us that the portion of the log which projected above the surface of the road was a dangerous obstruction, not that portion of it which remained buried beneath the surface of the highway, and, while proof that it had been removed might well have been omitted, we do not think it is a reversible error to have

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admitted it. The court, the jury, and counsel each and all understood that it was that portion of the log which was struck by the wheel of plaintiff's wagon only that was complained of as a dangerous obstruction to the highway. The authorities cited in the defendant's brief go to the extent only that it would not have been error to have excluded such proof. They do not go to the extent that it is reversible error to have admitted it. The case of *City of Emporia v. Schmidling*, 33 Kan. 485, is more nearly in point than any case cited by defendant's attorneys, and sustains our position.

McGRATH, J. Plaintiff was thrown from his wagon while driving along a highway in the defendant township, between 9 and 10 o'clock at night, July 23, 1888. The highway had been in use upwards of 15 years, had been turnpiked so as to form a road-bed from 14 to 16 feet wide, and was used generally. A log from five to seven inches in thickness lay near the center of the road-bed, running parallel with the line of the road. The southerly end of the log was imbedded in the earth, but from two to five feet of the north end was exposed to view. It had been allowed to remain in that position for from one and one-half to two years before plaintiff was injured. Three witnesses testified that the north end of the log rested upon or near the ground, and 9 or 10 witnesses testified that the top of the log at the north end was from 11 to 18 inches above the ground. Two witnesses testified that they had bunted against the log several times while driving along the highway, and one that his sleigh had caught upon it in attempting to drive over it. The most of the travel was upon the west side of the log, but the road was in good condition on the east side, and was used.

Plaintiff claims that while driving north on the night in question, at a moderate rate of speed, with two other persons in the wagon and on the seat with him, he sitting upon the extreme right of the seat, his horses shied, one

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of the wheels struck the log, and he was thrown out of the wagon, and dragged some six or eight rods, breaking his leg and otherwise injuring him, and that the injury to his leg was a permanent one. He says that he knew that the log was in the road, but did not realize that it was at that point, until his horses shied, when he saw the log, but it was too late to avert the collision.

The record contains 54 assignments of error, all of which are discussed in appellant's brief. The first 20 relate to the admission or rejection of testimony.

1. Plaintiff was allowed, under objection, to give the result of a measurement, made four weeks after the accident, of the size and height of the log from the road-bed. Testimony of this character is incompetent in the absence of testimony that the conditions are the same, and there is a likelihood that the situation may be changed; but here the testimony related to a log firmly imbedded in the earth, and accompanying the testimony objected to was evidence negativing the probability of a change of situation.

2. Plaintiff testified that he was unable to do any work until the next spring after he was injured. He was then asked the following question:

"Did you have to hire a man to do your farm work during the time you were laid up from this injury?"

Defendant objected to the testimony as incompetent; that plaintiff could not prove the value of his time in that way. The objection was overruled, and defendant excepted. The witness answered that "it was worth about a dollar and a half a day." The question asked was a proper one. The objection made was premature, and the witness answered, not the question asked, but the suggestion of defendant's counsel.

3. The attending physician was asked his opinion as to

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what effect the injury would have upon plaintiff as he grew older, and whether or not the "natural tendency of such a fracture would be to increase his disability as he gets older." The witness replied:

"I am inclined to think that after this length of time his limb will not improve. They usually improve for a year or two, but after this length of time probably the limb will not improve."

"The probability is, if he has rheumatic trouble or any trouble, it will be centered in this injured limb."

The questions were not clear, but the testimony given was admissible. Plaintiff was entitled to show the probable effects of an injury of this character, and it could only be shown by the opinion of a competent physician.

4. Plaintiff, in answer to questions, testified that he had a conversation with one Brown at his house in November after the accident; that he did not state to him that his horses got scared at a calf; that he did say to him that he claimed damages against the township; and he was then asked what claim he made to Brown. This was objected to as no part of the cross-examination, and because immaterial. Objection sustained, and exception by defendant.

"*Q.* Didn't you tell him that you got too far to the right side of the road, and a calf jumped up by a stump on the same side that you were sitting, and scared the team, and they sheered to the left, or words to that effect?

"*A.* No, sir; I didn't.

"*Q.* And threw you out?

"*A.* No, sir; I never told him any such a word.

"*Q.* Didn't you tell him that they drew you by the lines between a stump and the hind wheel of your wagon, and your foot caught in the wheel?

"*A.* No, sir; I never told him such a word.

"*Q.* And isn't that the theory that you gave to him of the injury at that time?

"*A.* No, sir.

"*Q.* Didn't you, in the spring, the next spring, some time in May or June, when he was down in your region

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there about your place, say that you had a notion to sue the doctor that set your leg for the injury, claiming that he didn't do his work right?

"*A.* No, sir; I don't think I told him any such thing. I know I didn't.

"*Q.* Do you swear you didn't?

"*A.* Yes, sir; I swear I didn't tell him so.

"*Q.* You swear positively?

"*A.* Yes, sir.

"*Q.* Didn't you say to him that the doctor paid no more attention to you than he would to a nigger or a dog?

"*A.* No, sir; I never said such a word to no man. I had a little conversation."

The question objected to was a proper one. If he made any claim to the highway commissioner different from that now made, or if he gave any other history of the accident, or accounted for it in any other way, it was proper upon cross-examination to draw it out; but defendant's counsel was allowed afterwards, as it will appear by the foregoing, to go into that matter, and the error was without prejudice.

5. Two witnesses (both farmers) who had worked with plaintiff on the farm in the hay-field and at other kinds of labor, both before and after the injury, were asked what they could say as to plaintiff's ability to do as good a day's work since he got hurt as before. This was competent. These men had had opportunities for observation and to make comparisons. They saw him at work, witnessed his movements, and observed the volume of work done. The question involved no matter exclusively within the domain of medical science. Indeed, the testimony of these men, as to the matters to which it related, was of a higher and better quality than that of a physician.

6. Plaintiff, in reply to a question, stated:

"I was driving carefully as a man could. I had been driving on a walk all the way up there. My horses had walked all the way to the water-hole,—that is, the creek

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south of Mr. Davis' about 80 rods, or a little better. I got out and watered them there. Went on about 30 or 40 rods, and I met Mr. Reed. I stopped and talked with him a minute, and drove on a walk until—I wouldn't say positively, but I think—a little way beyond Mr. Leonard Davis',—the old gentleman. It is a little down grade there, and nice piece of road. They trotted along a little there, and when they got beyond William Davis', just before we came to the log—a nice piece of road there; a smooth, nice piece of road, outside of this log—they started upon a trot, and I had my lines in my hands in good shape, as I always do, and they were trotting along, when they struck this log, slow."

After the examination of the witness had been concluded, counsel for defendant moved to strike out that part of the testimony where witness said he was driving as carefully as he could, but the court declined. The rule is that, where the court or jury can make their own deductions, they shall not be made by those testifying; but where the witness gives fully and succinctly, as in this instance, the facts upon which he bases that conclusion, there is no presumption of prejudice.

7. A witness was asked by defendant's counsel if he had ever heard or known of any one being injured on that obstruction before this, but the court properly excluded the testimony. *Hodges v. Bearse*, 129 Ill. 87 (21 N. E. Rep. 613).

8. The highway commissioner was asked by defendant to state whether the plaintiff had ever made a claim for damages against the township, and it was insisted that the fact that no claim was made tended to show that the claim now made was an after-thought on plaintiff's part; but the testimony was excluded. Suit had been commenced within 15 months after the injury. There was no dispute as to the fact or extent of plaintiff's injury, and none as to the existence of a log at the point described in the highway. We fail to discover how this

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testimony tended in the remotest degree to show that the suit was an "after-thought," and it was properly excluded.

9. Several errors are assigned upon the refusal of the court to admit the opinions of witnesses as to whether the highway at this point was dangerous, or the stick a dangerous obstruction. That question was for the jury. The size and location of the stick or log, as well as the width and character of the highway at that point, were matters susceptible of proof, and did not call for the introduction of the opinions or deductions of witnesses, and in such cases such opinions or deductions should be excluded. *Evans v. People*, 12 Mich. 27, 34.

10. The court rejected testimony as to how that portion of the road compared with other parts of the road in the same township. It was shown that this road had been in use for over 15 years. It was ditched and turnpiked. The abutting land had been cleared up generally. It did not appear that there was a single stump remaining in it. A log had been allowed to remain in the center of it for years. According to a number of witnesses, some of whom had made an actual measurement, one end of the log stuck out of the road-bed 4 or 5 feet, and the top of the log at the end was from 11 to 18 inches above the surface of the road. Others claimed that it was 6 or 7 inches above the ground. The statute[1] expressly exempts roads that have not been in use 10 years, and one of the purposes of this exemption is to protect townships from liability by reason of those ordinary obstructions, such as stumps, roots, and stones, incident to new roads. It cannot be said, however, that in case of a highway which has existed for over 15 years, and been generally used, the township is excusable because the obstructions complained of are common. It is for the jury to say whether this road at this point was rea-

[1] How. Stat. § 1446.

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sonably safe for travel, and that determination does not, under the state of facts existing here, depend upon the conditions of the road elsewhere.

11. A witness for defendant said that he knew plaintiff, and knew about his habits of driving. Counsel then asked what he could say as to his (plaintiff's) manner and method of driving his horses. The court very properly excluded the testimony. The fact that plaintiff was generally a careful driver could not excuse negligent driving on this occasion, nor could the opinion of a witness as to his habits on other occasions be admitted to establish his negligence on this occasion. *Williams v. Edmunds*, 75 Mich. 92; *Boick v. Bissell*, 80 Id. 260.

12. Plaintiff was asked on cross-examination if he had been drinking that evening, and he replied that he had taken one glass of beer. Defendant introduced a witness, and asked him what he could say as to plaintiff's being a drinking man,—whether he was addicted to the use of liquors. This testimony was properly excluded. The question is, what was plaintiff's condition as to sobriety at the time of the accident? It cannot be assumed that a drinking man, or one addicted to the use of liquors, is always drunk, or always in a condition which excludes the possibility of the exercise of due care.

13. Plaintiff called as a witness one Fryburg, who testified that he was overseer of highways of this road-district in 1889, and who was permitted to testify, under objection, that he cut off the exposed portion of the log in June, 1889. This was error. The evident purpose was to show that the township admitted by this act the defect, the dangerous character of this obstruction, and that the road was not reasonably safe by reason of its existence. After an accident a precaution may be taken which did not suggest itself before the accident, and, in the absence of any instructions from the court guarding

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the jury against the use of such testimony as an admission on the part of the township, the admission of the testimony is ground for reversal. *Fulton Iron & Engine Works v. Kimball Tp.*, 52 Mich. 149; *Lombar v. Village of East Tawas*, 86 Id. 14; *Hodges v. Percival*, 132 Ill. 53 (23 N. E. Rep. 423).

14. The other assignments of error relate to the instructions given by the court, and the court's refusal to give defendant's requests, and we find no error, except, perhaps, in that portion of the charge in which the court says:

"Ascertain all these questions from the evidence in the case, and was the log in that road in the condition that it is claimed? And the testimony *pro* and *con* does not vary much in that regard."

The court immediately used the following language:

"Was the highway in consequence unsafe and unfit for public travel, and was it reasonably safe and reasonably fit for travel? And you understand from the evidence as well as I what the real condition was."

The testimony regarding the condition of the log is conflicting, the witnesses fixing its height at from 4 to 18 inches above the road-bed. Upon the other questions referred to by the court there was little variance, but upon this question there was a very material variance, and there is a possibility that the jury may have been misled.

The judgment will be reversed, and a new trial ordered.

The other Justices concurred.

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JOHN COLE v. JOHN ROWEN.

Railroad companies—Control of depot grounds—Assault and battery.

1. A rule by which a railroad company reserves the right to assign places upon its own grounds to the different hackmen, and to exclude from such places others not assigned thereto, is reasonable, and a rule which the company has a right to enforce.
2. A depot master, who, acting under the direction of the railroad company, in attempting to enforce such rule, uses no more force than is necessary to eject a hackman from a place to which he has not been assigned, and which he is unlawfully attempting to occupy and hold, is not guilty of an assault and battery.
3. The following rules adopted by a railroad company for enforcement upon its own grounds are held reasonable:

"*a*—Location for omnibuses and hacks will be assigned to parties, who will occupy them while standing at the depot to get passengers.

"*b*—Drivers must take the stands which are assigned them, and will not be allowed to take places assigned to others.

"*c*—The positions assigned must not be occupied more than 20 minutes previous to the arriving time of passenger trains.

"*d*—Each driver must remain by his hack or omnibus when soliciting passengers.

"*e*—No hacks or omnibuses will be allowed to stand in the porch longer than necessary to load or unload passengers.

"*f*—The drivers of hacks and omnibuses will not be allowed in waiting rooms, except on business.

"*g*—Profane, obscene, boisterous language, or quarreling, will not be allowed on the depot grounds.

"*h*—Only one transfer wagon will be allowed to stand at the baggage-room, which will be the baggage-wagon that is hired by the railroad companies to transfer baggage between the different depots."

Error to Kalamazoo. (Buck, J.) Argued October 9, 1891. Decided October 30, 1891.

Case. Defendant brings error. Reversed, and no new trial ordered. The facts are stated in the opinion.

Edwards & Stewart (*Ashley Pond* and *Henry Russell*, of counsel), for appellant.

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Hawes & Luby, for plaintiff.

LONG, J. This is an action for damages for assault and battery, and was commenced in justice's court, where plaintiff had judgment for $6 damages and $3.25 costs of suit. Defendant appealed to the circuit court for the county of Kalamazoo, where the cause was tried before a jury on March 6, 1891, and plaintiff had judgment for $40 damages and costs of suit. Defendant brings the case to this Court by writ of error.

The plaintiff was a hackman, and went to the depot of the Michigan Central Railroad Company in pursuit of his legitimate business of soliciting the carriage of passengers from the incoming trains to the hotels and private residences in the city. He was in the employ of a Mr. Waud, who owned the hack and outfit. Arriving at the depot on the day upon which the assault was committed, he took a place upon the depot grounds of the railroad company with his hack, and, upon being told by the depot master that that place had been assigned to another hack, he refused to yield the place. The defendant is the depot master at that depot. The depot grounds occupy the space covered by the railroad track of the Michigan Central Railroad Company in what was formerly a street, and which had been vacated for the construction of the railroad. The grounds also include the entire north part of block 15 in the city, bounded north by the vacated street, and south by an alley. The title to this north part of block 15 is in the railroad company, and these are the lands upon which the plaintiff entered and stood with his hack, and from which he refused to remove to another part of said grounds.

It appears that the railroad company on April 25, 1890, made certain rules for the management of its depot grounds, and for the regulation of hack and bus drivers

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thereon, and for assigning stands for their vehicles in their business of soliciting passengers. These rules were promulgated by the depot master, who located the stands for the hack and bus men, telling each where to stand his vehicle. The stands located were indicated by numbers from 1 to 9, respectively, and 1 to 7 had been assigned and occupied by different hackmen prior to the occurrence complained of, and there was space yet left upon said grounds unassigned, which plaintiff might have occupied on that day. On September 15, 1890, plaintiff drove onto the grounds for passengers, and took possession with his hack of stand No. 3, which was not assigned to him, and which he knew had been assigned to another under the rules of the company. The defendant, the depot master, requested him to vacate the stand for a party who wanted and was entitled to it. This plaintiff refused to do, and the defendant pulled him from his hack, and ejected him from that place, offering to assign him another place upon the company's grounds, which plaintiff refused. It is apparent from the record that the defendant used no more force than was necessary to eject the plaintiff from that particular place. The defendant was acting, in thus ejecting plaintiff from that part of the grounds, under the rules of the railroad company. These rules were as follows:

"1. Location for omnibuses and hacks will be assigned to parties, who will occupy them while standing at the depot to get passengers.

"2. Drivers must take the stands which are assigned them, and will not be allowed to take places assigned to others.

"3. The positions assigned must not be occupied more than 20 minutes previous to the arriving time of passenger trains.

"4. Each driver must remain by his hack or omnibus when soliciting passengers.

"5. No hacks or omnibuses will be allowed to stand in

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the porch longer than necessary to load or unload passengers.

"6. The drivers of hacks and omnibuses will not be allowed in waiting rooms, except on business.

"7. Profane, obscene, boisterous language, or quarreling, will not be allowed on the depot grounds.

"8. Only one transfer wagon will be allowed to stand at the baggage-room, which will be the baggage-wagon that is hired by the railroad companies to transfer baggage between the different depots."

The court below charged the jury that—

"It would be competent for the railroad company to make such a rule as is included in these,—that the hackmen should not come to the station for passengers earlier than twenty minutes before train-time. That rule would be good, and could be enforced. The company could also make a rule that the hackmen should not stand within a certain distance of the platform of the station. That rule would be good. But, without enlarging upon these, there is one rule which the court, as a matter of law, following what the court conceives to be the decision of the Supreme Court on the same matter, holds is not good, and that is the rule that hackmen should be assigned places at the platform for the receipt of passengers, and that these places assigned should be occupied by no others. This the court holds, as matter of law, is not good."

It appeared upon the trial that the plaintiff at the time of the assault was not engaged in making any disturbance, or using any boisterous, vulgar, or obscene language, and was in no way offending against the rules of good order and decorum. The only question for consideration, therefore, is whether the rule adopted by the company reserving the right upon its own grounds to assign places to the different hackmen, and excluding from those places others not assigned thereto, is a reasonable one, and one which the company had a right to enforce.

The court below was in error in supposing that the rules adopted by the railroad company, and which were

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sought to be enforced by the defendant, were in conflict with the opinion of this Court in *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194. That was an action of trespass against the defendant for unlawfully entering upon a piece of ground near the depot in question, the plaintiff claiming in that case to have leased that particular piece of ground, with the right to use it to the exclusion of all others; and it was held by this Court that the railroad company had no right to give to one hack and bus company the right to the use and occupancy of a portion of its depot grounds to the exclusion of others engaged in a like business, and that the railroad company could not arbitrarily admit one common carrier of passengers or freight to its depot grounds, and exclude all others, for no other reason than that it was for its own profit or pleasure to do so. In the present case it appears that under the rules adopted by the company these stands were fixed and numbered, and the different carriers assigned to their places, for the sole purpose of accommodating the traveling public in coming to and departing from the depot, and to prevent quarrels among the hackmen as to place, and the annoyance occasioned thereby. Before these rules were adopted, it appears that the hackmen came there with their vehicles at all times of day; sometimes left their hacks to stand a half day at a time, and leaving the depot grounds so foul that in hot weather it was almost impossible for people to pass on account of the odors; and the railroad company was compelled from time to time to remove the gravel to abate the nuisance.

The rules adopted were reasonable rules, and were intended by the railroad company to convenience the traveling public. They in no manner give place to one hackman to the exclusion of another, and they deprive

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no common carrier of necessary approach to the depot grounds to carry on his business of carrier of freight and passengers. The rules touch and affect all alike. The mere fact that the railroad company fixes and determines the place where each particular hack shall stand is not a discrimination between hackmen, but is a necessary rule to prevent quarrels for place, so often seen among hackmen around depots. There can be no doubt that the railroad company has the right and authority to make and enforce all reasonable rules to restrain hackmen from committing offenses against good order on their grounds, and to regulate their conduct while there. *Com. v. Power*, 7 Metc. 596; *Markham v. Brown*, 8 N. H. 523. It must be held that the rules adopted and heretofore set forth are reasonable, and that the court was in error in holding otherwise. Inasmuch as it appears that the defendant acted under the direction of the railroad company, and was only attempting to enforce those rules and regulations, and that he used no more force than was necessary to eject the plaintiff from the place he unlawfully attempted to occupy and hold, the court should have directed the jury to return a verdict in favor of the defendant.

The judgment of the court below must be reversed, with costs of both courts. No new trial will be ordered.

The other Justices concurred.

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JOHN N. CHADDOCK v. ALONZO PLUMMER.

Negligence—Parent placing air-gun in hands of child.

An air-gun is not so obviously and intrinsically dangerous as to charge a father with negligence in placing it in the hands of his nine-year-old son, and make him liable for injuries sustained by reason of its use by another boy, not a member of his family, to whom it is delivered by his wife, in his absence and without his knowledge or consent.

Error to Berrien. (O'Hara, J.) Argued October 14, 1891. Decided October 30, 1891.

Case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

N. A. Hamilton, for appellant, contended:

1. A man who places in the hands of a child an article of a dangerous character, and one likely to cause injury to the child itself or to others, is guilty of an actionable wrong; citing *Binford v. Johnston*, 82 Ind. 427.
2. Children, wherever they go, must be expected to act upon childish instincts and impulses, and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken; citing *Powers v. Harlow*, 53 Mich. 507; *Harriman v. Railway Co.*, 45 Ohio St. 11 (12 N. E. Rep. 451); *Lane v. Atlantic Works*, 111 Mass. 136.
3. The law requires of persons having in their custody instruments of danger that they should keep them with the utmost care; citing *Dixon v. Bell*, 5 Maule & S. 198.
4. If one is guilty of negligence in leaving anything dangerous in a place where it is extremely probable that some other person will unjustifiably set in motion to the injury of a third, and if that injury should be so brought about, the sufferer may have

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redress by action against both or either of the two, but unquestionably against the first; citing *Lynch v. Nurdin*, 1 Q. B. 29.

5. The gist of the action is not the lawfulness of the act whence the injury proceeded, nor the existence of an evil intention, but is the fault of the defendant in neglecting to exercise such a reasonable degree of skill or diligence, or caution and prudent foresight, as, under the circumstances, might have avoided the injury; citing *Tally v. Ayres*, 3 Sneed, 677.

6. Every person owes a duty to the society in which he lives; and the reasonable care which persons are bound to take in order to avoid injury to others is proportionate to the probability of injury that may arise to others. He who does what is more than ordinarily dangerous is bound to use more than ordinary care; citing *Morgan v. Cox*, 22 Mo. 373.

7. Let us apply this test to this case. Suppose the defendant himself were the party whose eye was shot out by Tabor, and suppose he had brought suit against Tabor. Would not the law say to him, "'You cannot recover; by your own act in leaving the gun where the boy found it, or allowing it to be so left, you contributed to the injury?" Does it not follow that because he thus contributed to the plaintiff's injury he is liable? There is a multiplicity of cases on the subject, among which are the following: *Powers v. Harlow*, 53 Mich. 507; *Binford v. Johnston*, 82 Ind. 426; *Harriman v. Railway Co.*, 45 Ohio St. 11; *Clark v. Chambers*, 3 Q. B. Div. 327; *Tally v. Ayres*, 3 Sneed, 677; *Castle v. Duryee*, 2 Keyes, 169; *Cole v. Fisher*, 11 Mass. 137; *Carter v. Towne*, 98 Id. 567; *McDonald v. Snelling*, 14 Allen, 296; *Vincent v. Stinehour*, 7 Vt. 62; *Vandenburgh v. Truax*, 4 Denio, 464; *Guille v. Swan*, 19 Johns, 381; *Audige v. Gaillard*, 8 La. Ann. 71; *Wright v. Clark*, 50 Vt. 135; *Knott v. Wagner*, 16 Lea, 481 (1 S. W. Rep. 155).

8. The court should have charged, on the facts proven, that the defendant was guilty of negligence; but in any event, it is submitted that, beyond all possible question, the case should have been submitted to the jury with proper instructions as to the law; citing *Carver v. Plank-road Co.*, 61 Mich. 591; *Barnum v. Terpening*, 75 Id. 557; *Engel v. Smith*, 82 Id. 1; *Brezee v. Powers*, 80 Id. 172. And see generally on this subject, 2 Thomp. Neg. 1235—1240.

George M. Valentine and *George S. Clapp*, for defendant.

MORSE, J. Plaintiff brought this suit in the Berrien circuit court to recover damages for the loss of his right

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eye, which was destroyed by a shot from an air-gun in the hands of a boy named Roscoe Tabor. The circuit judge directed a verdict for the defendant.

The facts proven are substantially as follows: During the last of July or first of August, 1890, the defendant bought an air-gun, and gave it to his son, Harry Plummer, a lad aged about nine years. Defendant also bought at the same time some shot, such as are used in air-guns. Defendant cautioned his son to be careful in using the gun. The shot were all used in about two days, and some time later defendant bought his son more shot, which were used in half a day. No other shot were bought or furnished by the defendant, or by his order, or with his knowledge. Mrs. Plummer, the wife of the defendant, bought her son Harry some shot, which he also fired, except four shot, by one of which plaintiff was injured. On the morning of the accident, September 3, 1890, Harry fired the shot bought by his mother, except the four shot, and put the gun in the storm-house, which was a part of the dwelling, and put the four shot on a table-cloth, and went to school. Mr. Plummer was not at home. The Tabor boy came there with some rutabagas, and began looking and traveling about the premises, and found the gun in the storm-house, and then asked Mrs. Plummer for some shot, and she handed him the four shot which Harry had left on the table. She directed him to shoot at the hen-coop in the rear of the house. The boy fired one shot at the hen-coop, one at an apple tree, and then he went around to the north side of a new house, which Mr. Plummer was building, to a point about a rod east of the front of the new house, and eight or ten feet north of it. The boy was facing the west, and the street was to the west of him, and the street runs north-west and south-east. He put a grape on a plank, and looked to see if any one was in

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the street, and, seeing no one, he held the muzzle of the gun about two and one-half feet from the grape, and the gun was pointed down, and fired. The distance west to the street from where the boy was when he shot is from 70 to 100 feet. Mr. Chaddock at the time the shot was fired was standing in the street, looking at this new house of the defendant. The shot glanced from the board, and struck him in the eye, destroying it. The street was a frequently traveled highway in the village of Benton Harbor, then containing about 3,700 inhabitants, and at a point where defendant had long resided. Defendant's boy Harry was nine years of age when the gun was purchased, and the Tabor boy was ten years old when the shot was fired. The gun was the common make of toy air-gun for children, breaking in the middle for the insertion of the shot, and, when closed again, operating with a spring, compressing the air and expelling the shot. The shot used were "BB," or "double B." Harry was told by his father not to lend the gun to other boys, as they might break it. The Tabor boy lived out in the country, and occasionally visited at defendant's. It does not appear that the defendant knew of the purchase of shot by his wife, or that his boy had used all the shot purchased for him by defendant.

The contention of the plaintiff is that the air-gun in question is a dangerous weapon, and that the defendant did not use sufficient care in the keeping of it upon his premises; that, at any rate, the question whether he did use such care or not should have been submitted to the jury. But, as the facts are, the defendant cannot be held responsible for the injury to plaintiff, unless it was negligence, sufficient to support this action, in buying the gun and allowing his son to use it. He cannot be considered negligent in any other respect. He cautioned his boy to be careful in its use, and no carelessness of

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his own son was shown at any time in his use of it. The defendant and his son were neither of them responsible in any way, except owning the gun, for the use of it by the Tabor boy. It was kept inside the house, for the storm-door was an inclosure. If it came into the hands of Tabor through the negligence of any one, it was the negligence of the wife, for which the defendant is not liable.

This air-gun may be a dangerous weapon in a certain sense. The shot fired from it will not penetrate clothing, but it will put out the eye of a person, and will kill small birds and some small animals. These guns are in common and every-day use by children; over 400 of them were sold in one season by a dealer at Benton Harbor. But it is not more dangerous in the hands of children than a bow and arrow and many other toys. It would hardly be good sense to hold that this air-gun is so obviously and intrinsically dangerous that it is negligence to put it in the hands of a child nine years of age, and that such negligence would make the person so putting it in the hands of the child responsible for the act of another child, getting possession of it without defendant's consent or knowledge. Even if the gun had been left lying on the ground in the yard of the defendant, and the Tabor boy had picked it up outside the house, and used it, the defendant would not have been responsible for the damage done by the boy. An axe is considered a dangerous weapon, but if one leaves an axe by his wood-pile, and a child comes into the yard, picks it up, and injures another with it, is the owner of the axe liable for damage because he has not put this deadly weapon under lock and key?

And if it be granted that this air-gun loaded is a dangerous weapon, as is a gun loaded with powder and ball, would this fact make the defendant liable? I think

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not. Suppose a person, owning a shotgun, should put the same unloaded within the storm-door of his house, and a neighbor's boy, 10 years of age, without the knowledge or consent of the owner, should pick up the gun, and obtain from the wife or some other member of the household a loaded cartridge, and take the gun out and discharge it, accidentally wounding some one, would the owner of the gun be responsible for the damage resulting to the injured person? To so hold him responsible would necessitate the keeping of unloaded fire-arms under lock and key, with the key in the possession at all times of the owner. This is not a case of leaving a torpedo or dynamite where it may be expected that children will find and play with it. An unloaded gun is harmless; a torpedo or dynamite is not, but is dangerous anywhere, and under all circumstances, to those not acquainted with the proper method of handling it, and liable to explode even in the hands of those who are expert in using it.

In my opinion, it was not negligence *per se* for the defendant to buy this toy gun, and place it in the hands of his boy nine years of age; and there were too many intervening causes without the act or knowledge of the defendant, between the buying of the gun and the injury, to hold the defendant liable for its use in this case. If his own son had, in any manner, contributed to the accident, a different question would arise, upon which I express no opinion.

The judgment must be affirmed, with costs.

The other Justices concurred.

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The American White Bronze Company v. Joel H. Gillette, Administrator, and Phoebe Gitchel, Administratrix, of the Estate of Henry Gitchel, Deceased.

Contract—Failure to perform—Rescission.

Where an order is given for a monument with certain inscriptions, among which is the name, date of death, and age of the deceased, and the manufacturer omits from the inscription the age, the orderer has the right to reject the monument, and, in the absence of an agreement that the manufacturer may remedy defects or furnish a new monument, he can do neither, the contract being ended by notice of such rejection.

Error to Berrien. (O'Hara, J.) Argued October 13, 1891. Decided October 30, 1891.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

J. J. Van Riper and *Edward Bacon*, for appellant.

Theo. G. Beaver (*George S. Clapp*, of counsel), for defendants.

Morse, J. March 28, 1888, Henry Gitchel, deceased, gave to the plaintiff's agent, Charles C. Sherrill, of Niles, Mich., an order for a monument, with certain inscriptions thereon, among which was the following:

Lower tablet—"Rosanna Gitchel, wife of James Miller. Died July 30, 1876. Age 30 yrs. 11 months."

The order provided that the shipment was to be made to Mr. C. C. Sherrill, Niles,—

"As soon as convenient after June 1, 1888. Payment to be made in cash after work is set in the cemetery.

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* * * This monument is fully warranted in every respect to be just as represented in our circulars."

The contract price was $800. The monument was shipped June 30, 1888. It arrived at Niles July 14, 1888, and was erected upon Henry Gitchel's lot in the cemetery at that place. The inscription above noted was not perfect, the age being left out, so that it read:

"Rosanna Gitchel, wife of James Miller. Died July 30, 1876."

This defect was discovered by Sherrill, the agent of plaintiff, who notified the company thereof sometime prior to August 8, 1888. Mr. Henry Gitchel died before the trial of the suit in the court below, and we are therefore deprived of his evidence, but the following notice, served by him upon the plaintiff, shows that at its date plaintiff had made some proposal to him in regard to remedying this omission:

"To American White Bronze Co.,
"Chicago, Ill.:

"You having failed to comply with my order, dated March 28, 1888, for a white bronze monument, you are notified that I hereby rescind and revoke said order, and I decline to accept the proposition made by you in relation to the same under date of August 8, 1888.

"Yours, &c.,
"Henry Gitchel.

"*Dated, Niles, Aug.* 8, 1888."

The plaintiff offered no testimony to show what this proposal was. It is contended by the plaintiff that this notice was not sufficient, in that it did not point out the defects of which Gitchel complained, or in what respect the monument did not conform to the order. But it is evident that this omission in the inscription was known to both plaintiff and Gitchel, and the notice was therefore sufficient as regards this defect. On receiving the notice, plaintiff consulted an attorney as to its rights in

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the premises, and after such consultation concluded to furnish Gitchel with an entirely new monument. This new monument was shipped to Niles, arriving in the cemetery December 11, 1888. It was found that the base was broken, and it was thereupon shipped to the plaintiff at Chicago, by its agent, and another or third monument forwarded, which was put up on Gitchel's lot, without his knowledge or consent, January 14, 1889. The plaintiff claims that this last monument conforms in every respect to the order, and is complete and perfect. The defendants deny this, and claim defects in it. In my view of the case, this contention is immaterial. There is no proof tending to show that Henry Gitchel ever agreed to take a new monument in the place of the first one erected on his lot; but when monument No. 2 was brought to the cemetery it is shown that he notified Sherrill, plaintiff's agent, not to trespass upon his lot, and gave a written notice to the sexton, Mr. Lafler, which Lafler read to Sherrill on the day of its date. The notice was as follows:

"NILES, December 13, 1888.

"MR. C. H. LAFLER:

"I hereby order you to forbid Mr. Sherrill, or any member or agent of the American Bronze Company, to put up any monument on the lot of David Gitchel estate, in Silver Brook Cemetery, as I shall consider it a trespass if they do.

"HENRY GITCHEL."

The material composing the first monument, except the urn, which could not be found, was taken by the plaintiff and shipped to Chicago. This suit is not brought to recover the contract price for the first monument on the ground that it complied with the agreement. It cannot be claimed that it was accepted, nor is the action brought

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for the value of the monument as first set up. It must be held that the plaintiff conceded, when it undertook to furnish a new monument, and took away the old one, that it did not meet the requirements of the order. The plaintiff's declaration counts upon the contract, and alleges a fulfillment of it in making and putting up the monument of January, 1889, with no hint or intimation of the matters shown in the proof relating to the first and second monuments. The case was submitted to the jury, who decided in favor of the defendants.

Various errors are assigned to the rulings and charge of the court, but none of them are material. As the case stood, the circuit judge would have been amply justified in directing a verdict for the defendants. The defect in this inscription was an important one. The age being left out, there was no date remaining but the day and year of the death. As the age was made a particular part of each inscription of death, and there were seven of them, the omission of it in this instance cannot be considered as an immaterial defect. Henry Gitchel was not obliged to accept it as it was. It was undertaken to be shown that what is known as a "working order" was exhibited to him before the first monument was completed, and that it came back to the plaintiff, marked "O. K." This testimony was, however, immaterial. By its own action the plaintiff waived its right, if it had any, on this account to force an acceptance of the monument as it was upon Gitchel, and sought to remedy it by building a new one, after Gitchel had repudiated the one furnished, and without his consent, and against his express orders.

Had the plaintiff, the defect as above stated being admitted in the monument first sent, a right to build a new one, and put it up under the agreement in the

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order, without the consent and against the protests of Henry Gitchel? This is the only question in the case. In the order or agreement in this case there was no provision that the plaintiff should be notified of any defect in the monument, and allowed a reasonable or fixed time thereafter in which to remedy such defects. The performance of the contract preceded payment. There was a substantial failure to perform the contract, and, unless the plaintiff had the right to keep on experimenting until a perfect monument was erected, the plaintiff could recover nothing, although Gitchel did not remove the monument first furnished at once from off his lot. Permitting it to stand there would not be an acceptance; and, as the company finally removed it, and did not insist upon an acceptance of it as it was first erected, the fact that Gitchel did not remove it until late in the fall can have no bearing on the issue here.

I can find nothing in the order or in law giving the plaintiff in this case a right to furnish Gitchel the new or third monument, for which this suit is brought. The order provided that the monument should be shipped to Niles, as soon after June 1, 1888, as convenient to the plaintiff. The plaintiff fixed such convenient time by shipping it June 30, 1888. It was not in compliance with the order. There is nothing in the agreement to meet such a case. It is therefore a naked case of a delivery within the time agreed upon of a monument not of the description ordered. In such case the law steps in, and says that the purchaser is not obliged to accept it.

"When the subject-matter of a sale is not in existence at the time of the contract, an undertaking that it shall, when existing, * * * possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract." *Pope v. Allis*, 115 U. S. 363, 371 (6 Sup. Ct. Rep. 69).

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And I know of no rule of law, in such a case as this, where the manufacturer has tendered goods or machinery in performance of a written order or agreement of purchase, that obliges the purchaser, if the article or articles do not conform to the agreement, to permit the manufacturer to keep on tendering other goods or new machinery until the terms of his contract are performed, unless the contract expressly provides that he shall have such opportunity. When, as in this case, the article delivered is not of the description of the article ordered, the purchaser has a right to reject it, and to rescind the contract *in toto*.

We are cited to *Davis v. Downs*, 4 Mich. 530, to sustain plaintiff's claim that it had the right to remedy the defects in the first monument, or to furnish a new one; but in that case there was no stated time of delivery, and it was held that the purchaser undertook to rescind the contract prematurely, before all the castings were sent, and must pay for all the good castings that were delivered. In the opinion of the Court there is language to the effect that the manufacturers had the right to furnish good castings in the place of those that were defective. If this is good law for that case, it does not apply to the facts in the case now before us. Henry Gitchel ordered a monument to be constructed in a certain way, with certain inscriptions upon it. When delivered, a material inscription was omitted. It was not the monument he ordered. He had the right, under all the authorities, to reject it, because the existence of the omitted inscription, being a part of the description of the thing sold, became essential to the identity of the monument ordered, and a condition the performance of which was precedent to any obligation upon Gitchel to take it. Benj. Sales, § 1349. There being no agreement that the plaintiff might remedy defects or furnish a new

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monument, the contract between the parties was at an end when Gitchel refused to accept the first monument.

The judgment is affirmed, with costs.

The other Justices concurred.

ANDREW CUNNING v. THE TITTABAWASSEE BOOM COMPANY.

Landlord and tenant—Action for rent—Estoppel—Trust-deed.

1. A lessee, who has not been disturbed in the enjoyment of the rights granted under his lease, cannot, in an action by the lessor to recover the rent reserved, question the right of the lessor to make the grant.
2. Where the grantor in a trust-deed, authorizing the trustee to lease, mortgage, or sell the premises conveyed in order to pay the debts of the grantor, is allowed by the trustee, with the assent of the creditors, to remain in possession under an arrangement to pay rent to the trustee, or to carry on the business in his own name, as it had been done, the trustee and the creditors are estopped from setting up any claim against one to whom the grantor has leased a portion of said premises.
3. A lease of a portion of a dock, which had been leased for storage purposes to a prior lessee, who accepts and uses another portion of the dock, will not amount to an eviction of the first lessee, who will be held to have assented to the change.

Error to Bay. (Cobb, J.) Argued October 16, 1891. Decided October 30, 1891.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

McKnight, Humphrey & Grant, for appellant, contended:

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1. Defendant's theory was that it had an absolute right to tie to that dock, or any piles driven in the navigable waters of the street, if by so doing it would lessen the perils to it of the navigation of the river (*Horn v. People*, 26 Mich. 221; *Scott v. Layng*, 59 Id. 43), which right defendant claimed adversely to the plaintiff; and the testimony that the dock extended into the street was competent and relevant to show that plaintiff had no rights to rent, and that it was unreasonable that defendant should have made the contract as claimed by plaintiff; citing *Petrie v. Lane*, 58 Id. 528; and defendant was entitled to have its claim that it fastened this boom to piles driven by Rust Bros., and claimed so to do as a matter of right and adverse to any claim of the plaintiff, laid before the jury, as one of the surrounding facts essential to a satisfactory determination; citing *Comstock v. Norton*, 36 Mich. 279.
2. The act passed for the formation of boom companies gave defendant the right to "construct, use, and maintain all necessary booms," etc., by obtaining the consent of the owner of the shore in front of which the booms were constructed; citing How. Stat. § 3917; *Hall v. Boom Co.*, 51 Mich. 377; *Coburn v. Booming Co.*, 72 Id. 134.
3. An action for use and occupation will not lie except when the contract relation of landlord and tenant exists, by virtue of which an obligation exists to pay rent; citing *Lockwood v. Boom Co.*, 42 Mich. 538.
4. The terms of the trust-deed could not be contradicted by testimony showing a parol agreement allowing plaintiff to collect rent; citing *Adair v. Adair*, 5 Mich. 204; *Jacobs v. Miller*, 50 Id. 119.

T. A. E. & J. C. Weadock, for plaintiff.

McGrath, J. Cunning brought *assumpsit* in justice's court, declaring orally "on all of the common counts, and specially for use and occupation of certain dock and river front, and being on lots 5 and 6," etc., for 3 years, 2 months, and 20 days, at the rate of $125 per annum, admitting a credit of $250. Defendant pleaded the general issue, and gave notice that the title to lands would come in question, and the case was removed to the circuit court, where plaintiff had judgment, and defendant appeals.

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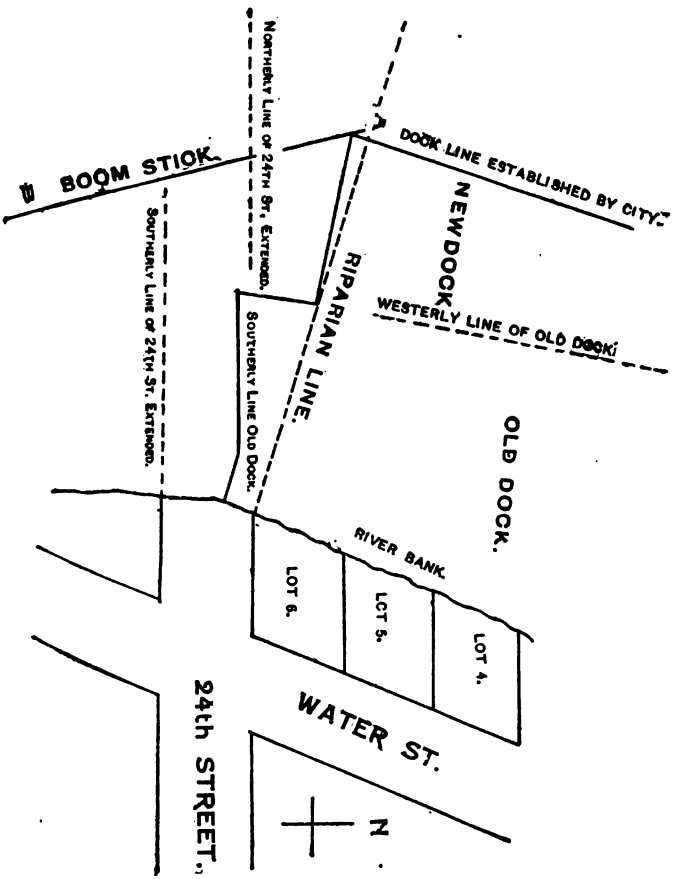
The following is a sketch of the situation of the property:



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Plaintiff was in possession of lots 4, 5, and 6, and the contiguous dock property, from January 1, 1886, to January 1, 1890. The old dock extended southerly beyond the north line of Twenty-fourth street, and plaintiff had extended the dock westerly to the dock line established by the city, and enjoyed a southerly as well as a westerly dock frontage. The northerly line of Twenty-fourth street, extended, would cut off a portion of plaintiff's old dock, and a line extended from the south-westerly corner of plaintiff's lot 6, at right angles with the river bank, which was claimed by defendant to be the riparian line, would cut off still more of plaintiff's old dock, and a portion of his new dock.

Plaintiff's claim was that in April, 1886, he rented to defendant the privilege of putting a glance boom across the front of plaintiff's dock, extending from A to B, and also a place upon the dock to store coal for the use of defendant's vessels; that defendant was to attach the north end of the boom-stick with hook and staple to plaintiff's dock, and plaintiff, when he desired to get to the southerly side of his dock, was to open and close it; that defendant's use commenced April 1, 1886, and continued until June 20, 1889; that defendant was to pay as rental $125 per year during said use; that defendant had paid the rental to April 1, 1888; that in the fall of 1887 plaintiff leased to one Corrigan the portion of the dock which had been occupied by defendant with its coal, and notified defendant's foreman to put their next load of coal further north upon lot 4, which defendant did. There was some dispute as to whether defendant used the coal dock after the season of 1887, but the glance boom remained until June 20, 1889.

Defendant admits the renting of a portion of plaintiff's dock for coaling purposes, but denies that anything was said about the glance boom, claims that it ceased to use

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the dock for coal in the fall of 1887, and assigns error because of the refusal of the court to allow answers to the following questions:

"Isn't there some of it [the dock] built into Twenty-fourth street?"

"Weren't these piles driven in the street?"

"How did you find the situation of Mr. Cunning's dock, with reference to Twenty-fourth street?"

"State how many feet Mr. Cunning's dock stands into Twenty-fourth street on the south."

When asked by the court to state what he expected to show defendant's counsel said:

"We offer to show that this boom-stick was in front of a public street, and was not in front of a slip belonging to Mr. Cunning at all."

Again he said:

"I ask it for the purpose of showing, and in connection with it I offer to show, that this boom-stick was attached to piles that Rust Bros. & Co. drove, and that this boom-stick did not extend onto Mr. Cunning's property at all.

"*The Court:* I suppose by that you mean to attack the title of Mr. Cunning to this property he has been speaking of?

"*Counsel for Defendant:* I intend to attack his right to maintain that dock in the street, or to claim on an *assumpsit* against us for the boom-stick being in front of a portion of his dock that is in the street. I propose to show that the boom-stick was fastened to piles that did not belong to Mr. Cunning, and that he never put there.

"*The Court:* In view of the statement that the plaintiff claims on nothing except an express contract that he claims to have been made, and the fulfillment of that contract, I don't think that matter is material."

There was no error in the exclusion of the testimony. Plaintiff relied upon an express contract granting certain privileges. Defendant had not been disturbed in the use granted. He could not question plaintiff's right to make

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the grant. It is claimed here that the testimony tended to support defendant's theory, and bore upon the probabilities of such a contract, but no such claim was made below. The testimony, however, had no such tendency. Whether or not plaintiff's dock encroached upon Twenty-fourth street, he was in actual possession and use of that dock, and had a right to free access, not only to the westerly, but to the southerly, frontage. Defendant had no right to place any permanent structure, so as to interfere with plaintiff's approach to his docks, without his consent. Defendant afterwards introduced testimony tending to show that the boom-stick had been there since 1884, and was fastened to piles driven by Rust Bros., and plaintiff testified that these piles were driven by the Rusts by permission of plaintiff, and that they "lapped around" this corner of plaintiff's dock, but denied that the boom-stick had been there before 1886.

Defendant's counsel introduced in evidence a deed, dated September 11, 1888, executed by plaintiff, conveying lots 5 and 6 in trust to one Van Den Brooks, in which it was provided—

"That he [Van Den Brooks] may lease, mortgage, sell, and convey said property in order to pay all my debts, also the mortgages, interest, and taxes now due on said property; the balance, if any, to be returned to me [Cunning]."

After the introduction of this deed plaintiff was allowed to show that ever since the giving of said deed plaintiff was allowed to remain in possession, carry on business there, and collect rents under an arrangement with the trustee, made after the execution of the deed; and the trustee was sworn, and said:

"Yes, there was a mutual agreement between me and Mr. Cunning that he should remain there, collect rent, collect all bills, and turn the money over to me, to pay

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his local debts that the assignment was made for; so he remained there just as before."

Several errors are assigned upon the admission of this testimony. It is true that the trust-deed contemplated the sale or leasing of the property for the benefit of creditors, but the deed secured the creditors, and if the trustee, with the assent of the creditors, allowed the grantor to remain in possession under an arrangement to pay rent to the trustee, or to carry on the business in plaintiff's own name, as it had been done, defendant could not complain, and both trustee and creditors would be estopped from setting up a claim against one to whom plaintiff, in possession of the whole property, had sublet a privilege.

It was claimed by defendant that the lease to Corrigan was an eviction, but it appeared that defendant did not at the time elect so to regard it, but accepted and used another location provided by plaintiff, and hence consented to the change.

Complaint is made of several portions of the court's instructions to the jury, which are fully explained by the context. A careful examination of the charge discloses no error.

The judgment is affirmed, with costs.

CHAMPLIN, C. J., MORSE and LONG, JJ., concurred. GRANT, J., did not sit.

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THE DANVILLE STOVE & MANUFACTURING COMPANY v. ALLEN C. ADSIT, CIRCUIT JUDGE OF KENT COUNTY.

Justices' courts—Appeal—Notice of application—Acceptance of service—Retroactive statute.

1. Act No. 73, Laws of 1891, amending How. Stat. § 7005, by authorizing service upon the agent or attorney who appears for a party who obtains a judgment in justice's court, from which a special appeal is sought to be taken, of notice of all subsequent proceedings in the cause, is not retroactive.
2. Prior to the amendment of How. Stat. § 7005, by Act No. 73, Laws of 1891, service of notice of application for leave to appeal from justice's court, made upon the opposite party without this State, conferred no jurisdiction upon the circuit judge to allow the appeal, nor was the requirement waived by an acceptance of service outside of the State.

Mandamus. Submitted November 10, 1891. Granted November 11, 1891.

Relator applied for *mandamus* to compel respondent to set aside an order granting a special appeal. The facts are sufficiently stated in the opinion.

Taggart & Denison, for relator.

James E. McBride, for respondent.

PER CURIAM. In this matter a judgment was rendered in justice's court, October 29, 1890, in favor of relator and against one Annie Tazelaar. May 11, 1891, under the statute as it then existed, the circuit judge, respondent here, granted the defendant an appeal. Upon application to this Court, a *mandamus* was issued to set aside the order granting such appeal, upon the ground that no proper service of notice of the application for appeal had

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ever been served on relator.[1] The service was made upon the company outside of the State of Michigan.

Act No. 73, Laws of 1891, went into effect October 2, 1891. October 6, 1891, an order to show cause was made by respondent, upon application, why the appeal of said Annie Tazelaar should not be granted. This order was served upon the attorney of relator in justice's court. October 13, 1891, the appeal was granted.

The statute relating to appeals, as amended by Act No. 73, Laws of 1891, provides that, where the party obtaining judgment appears by attorney or agent, it will be sufficient to serve notice of subsequent proceedings in the cause upon such attorney or agent. We think this statute is not retroactive, and the writ must be granted commanding respondent to set aside his order granting the appeal.

MARTIN CONLEY v. THE BOARD OF SUPERVISORS OF ST. CLAIR COUNTY.

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Drains—Jurisdiction of county commissioner—Assessment of taxes.

Sections 4 and 7 of chapter 2 of the drain law of 1885 (3 How. Stat. §§ 1740*a*7, 1740*b*) are construed:

a—As giving to the county drain commissioner concurrent jurisdiction with the township drain commissioner of drains *entirely* within the latter's township.

b—As prohibiting the spreading of taxes for the construction of drains by such commissioner until all of the records thereof required to be made by him are filed with the county clerk.

[1] The service was made at the home office of the plaintiff, in Pennsylvania, upon its president, who accepted the same in writing.

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Mandamus. Submitted November 10, 1891. Order to show cause denied November 11, 1891.

Relator, as county drain commissioner, constructed a drain in the township of Casco, under application made therefor. The special assessment roll for the expense of such construction was laid before the respondent, who refused to order the same spread upon the township assessment roll, for the following reasons:

1. Because, the drain being wholly within the township of Casco, the relator should have filed the papers relating thereto with the township clerk of said township, which was not done.
2. Because relator did not file the papers and records relating to said drain with the county clerk.

Whereupon relator applied for an order to show cause why respondent should not be directed to order such assessment.

Henry P. Jenney, for relator.

PER CURIAM. The tax cannot be levied in this case until all the records required by the statute (3 How. Stat. § 1740*a*9) are deposited and filed in the office of the county clerk.

The drain is entirely within the limits of the township of Casco, but the county drain commissioner has concurrent jurisdiction with the township drain commissioner in such cases. The records, however, if he acts, must be filed in the county clerk's office, and not with the township clerk.

3 How. Stat. § 1740*b*, provides that—

"No tax for the construction of a drain shall be spread upon the tax roll until all the records thereof, required to be made by such commissioner, are filed with the clerk."

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This statute evidently refers to all drains, by whomsoever laid.

As it is admitted by the petition that the statute has not been complied with in this respect, the application for an order to show cause will be denied.

EDWARD A. GRONDIN AND PETER LA FRANCIS v. HUGH LOGAN, SUPERVISOR, AND WALTER MELLEN, CLERK, OF THE TOWNSHIP OF SENEY.

Mandamus—Township board—Justices of the peace—De facto officers.

1. An answer to a petition for *mandamus*, which denies the allegations of fact upon which the application is based, is decisive on a hearing upon petition and answer.
2. How. Stat. § 745, which provides that when, from any cause, there shall nôt be three of the officers constituting the township board of a township competent or able to act, one of the remaining justices, on being notified by any member of the board, shall meet with any members of the board, and possess like authority with them, authorizes the members to call upon any justice of the peace of the township to act *temporarily* as a member of the township board.
3. A township board cannot question the election or qualification of justices of the peace, who have acted and been recognized as such for more than one year, in *mandamus* proceedings prosecuted to compel the board to allow such justices to act as members thereof.

Mandamus. Submitted November 10, 1891. Denied November 11, 1891.

Relators applied for *mandamus* to compel respondents to recognize them as justices of the peace of the town-

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ship of Seney, and, as such, entitled to seats as members of the township board. The facts are sufficiently stated in the opinion.

James J. Brown (*George H. Prentis*, of counsel), for relators.

Clark & Pearl (*Cahill & Ostrander*, of counsel), for respondents.

PER CURIAM. In this case the justices of the peace in the township are Miller, whose term expires in 1892, La Francis, whose term expires in 1893, Grondin, whose term expires in 1894, and Allen, whose term expires in 1895.

The relator, Grondin, filed his petition for *mandamus* upon the theory that Miller had removed from the township, and his office was thereby vacant. This is denied by the answer, and settles the matter so far as this application is concerned. La Francis, who was elected to fill a vacancy, and Miller, must be considered the two oldest justices, and entitled to seats on the township board.

Grondin has no standing here, because, in case of a temporary disability of one of the elder justices to act, the statute (How. Stat. § 745) provides that "one of the remaining justices," on being notified by any member of the board, shall meet with the board, and have the same authority as the other members, in case there shall not be three members of the board able or competent to act. In such case the members of the township board can call upon any justice to act temporarily as member of the board. Allen would have no right to act on the board, to the exclusion of La Francis.

We must hold that the board cannot here question the election or qualification of Grondin and La Francis.

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They have acted as justices for over a year, and been recognized as such.

We must deny this application so far as Grondin is concerned, and, as to La Francis, Grondin shows no authority to make complaint in his behalf. If La Francis is hereafter denied his right to sit upon the town board, upon proper application we will enforce such right.

No costs will be allowed to either party.

THE PEOPLE v. DANIEL CUMMINGS.

Constitutional law—Indeterminate sentences.

Act No. 228, Laws of 1889 (3 How. Stat. §§ 9613*b*–9613*g*), providing for indeterminate sentences, and the disposition, management, and release of criminals under such sentence, is unconstitutional.

Error to Muskegon. (Dickerman, J.) Argued May 6, 1891. Decided November 13, 1891.

Respondent was convicted of larceny, and sentenced under Act No. 228, Laws of 1889, to the State House of Correction and Reformatory, at Ionia, not less than two, nor more than four, years. Sentence vacated for all over two years. The facts are stated in the opinion.

James E. McBride, for respondent.

A. A. Ellis, Attorney General, and *Willard J. Turner*, Prosecuting Attorney, for the people.

MORSE, J. This case involves the constitutionality of

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Act No. 228, Laws of 1889. The act, in full, is as follows:

"An Act to provide for indeterminate sentences, and disposition, management, and release of criminals under such sentence.

"SECTION 1. *The People of the State of Michigan enact*, That every sentence to State Prison at Jackson, the State House of Correction and Reformatory at Ionia, and the State House of Correction and Branch of the State Prison in the Upper Peninsula, of any person hereafter convicted of a crime, except of a person sentenced for life, or a child under fifteen years of age, may be, in the discretion of the court, a general sentence of imprisonment in that one of the prisons provided by law for the offense of which he is convicted. The term of such imprisonment of any person so convicted and sentenced may be terminated by the board as authorized by this act; but such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced; and no prisoner shall be released until after he shall have served at least the minimum term provided by law for the crime for which he is convicted.

"SEC. 2. Every clerk of any court by which a criminal shall be sentenced to any prison, whenever the term of such sentence may not be fixed by the court, shall furnish the warden or other officer having such criminal in charge a record containing a copy of the information or complaint, of any special plea, the name and residence of the judge presiding at the trial, also of the jurors and of the witnesses sworn on the trial, with a statement of any fact or facts which the presiding judge may deem important or necessary for the full comprehension of the case, and of his reasons for the sentence inflicted; and such copy, statement, and abstract, signed by the clerk of the court, shall be *prima facie* evidence against the convicted person in all proceedings for the relief of such person by a writ of *habeas corpus* or otherwise. The clerk of the court shall be entitled to such compensation in every case in which he shall perform the duties required by this act as shall be certified to be just by the presiding judge at the trial, and shall be paid by the county in which the trial is had, as a part of the court expenses. The clerk shall also, upon any conviction and sentence, forthwith transmit to the warden of the prison to which sentenced notice thereof.

"SEC. 3. The board of control of prisons shall have power to establish rules and regulations under which prisoners sentenced under this act may be allowed to go upon parole outside of the buildings and inclosures, but to remain, while on parole, in the legal custody and under the control of the board, and subject at any time to be taken back within the inclosure of said prison; and

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full power to enforce such rules and regulations, and to retake and reimprison any convict so upon parole, is hereby conferred upon said board, whose written order, by its clerk, shall be sufficient warrant for all officers named therein, to authorize such officer to return to actual custody any conditionally released or paroled prisoner; and it is hereby made the duty of all officers to execute such order the same as in any ordinary criminal process.

"SEC. 4. The board shall make such rules and regulations for the separation and classification of prisoners sentenced under this act into different grades, with promotion and degradation, according to the merits of the prisoners, their employment and instruction in industry, and generally, as may from time to time appear to be necessary or promotive of the purposes of this act.

"SEC. 5. And it is hereby provided that when any prisoner violating the conditions of his parole or conditional release (by whatever name) is, by a formal order, entered in the board's proceedings, declared a delinquent, he shall thereafter be treated as an escaped prisoner owing service to the State, and shall be liable when arrested to serve out the unexpired period of the maximum possible imprisonment, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any part or portion of the time served; and any prisoner at large upon parole or conditional release, committing a fresh crime, and upon conviction thereof being sentenced anew to the prison, shall be subject to serve the second sentence after the first sentence is served or annulled, to commence from the date of the termination of the first sentence.

"SEC. 6. Nothing in this act contained shall be construed to impair the power to grant a pardon or commutation in any case.

"Approved July 1, 1889."

It is not clear from the reading of this statute whether the board of control is given the power of absolute discharge from imprisonment or not. If so, it would be clearly unconstitutional, as the exercise of such power would certainly involve one of two things, and perhaps both. It would be the exercise of judicial power in determining the term of imprisonment of a citizen, or an act of grace, to wit, the bestowing of a pardon and release of a prisoner before his term of imprisonment had expired. The judicial power of this State, by the Constitution, is vested in certain specified courts (section 1, art. 6), and the pardoning power is vested absolutely

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in the Governor of the State (section 11, art. 5). The first section of the act provides that—

"The term of such imprisonment of any person so convicted and sentenced may be *terminated* by the board as authorized by this act; but such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced; and no prisoner shall be released until after he shall have served at least the minimum term provided by law for the crime for which he is convicted."

But from the other clauses of the statute it may be inferred, perhaps, that this release is in all cases to be a conditional one, and that it is a system of parole that is contemplated by the law.

Yet if it be considered that the only power conferred is a conditional release upon parole, still, if the prisoner keeps his parole, or, rather, if the board are of the opinion that he does, the release is in fact an absolute one. By what refinement of reasoning it can be made to appear that this is not in effect a pardon of the prisoner, is beyond my comprehension. And, in my opinion, this act also confers upon the board judicial power. The term of imprisonment is fixed by the board, and not by the court. The sentence is to confinement in the prison generally,—no term is fixed by the judge. How long that term shall be, rests entirely in the will of the board. It may be one day or fifteen years, as they see fit, in some cases.

It is in the power of the Legislature to fix all punishment for crime, and to provide for a minimum and maximum punishment, and to give the courts in which the prisoners are convicted a discretion to fix a term between these limits, but it cannot be contended for a moment that this discretion can be given to any other person or persons. To do so would imperil the liberties of the citizen by putting his punishment for wrongs

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committed into the arbitrary power of unauthorized persons, without any right of remedy in the courts. Nor can the Legislature authorize a circuit judge to delegate his power and discretion in such a case to any other person or persons than himself. Under this act, the general sentence, without interference from other parties, must stand for the length of time fixed by the maximum term. The court imposing this sentence has no discretion. It may be truly said that he has a discretion in the first place as to whether he will sentence under the act or not. But this discretion is whether he will delegate his power and authority in the premises to the board of control or not, and we are now dealing with a case where he has exercised this first discretion.

It is said that this act "is evidently promoted by a desire to reform, as well as to punish; to make better those under sentence, as well as to protect society." Let us see how it will work in the interest of reform, and what will be the discretion of the trial judge,—the one person best calculated, from his knowledge of all the incidents and circumstances of the commission of the crime and of the character of the prisoner, to exercise a discretion in fixing the term of imprisonment. Take, for instance, a person convicted of manslaughter. The maximum penalty is imprisonment in the State prison for 15 years, the minimum a fine not exceeding $1,000; the sentence may be one day's imprisonment, it may be a fine of one cent. If the crime appears to be somewhat of an aggravated character, and the prisoner a bad man and an old offender, the circuit judge may reason, "There is no hope of reforming this man, so I will sentence him to ten years in State prison." At the end of ten years the prisoner is released unconditionally. In another case the nature of the crime may be such that the circuit judge may think the prisoner ought not to

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be let off with a fine, but deserves imprisonment; but there is hope for reform, and he therefore concludes to sentence him under the indeterminate law. The moment he pronounces this sentence the term of imprisonment is entirely, not only at the discretion of the board of control, but at their will and pleasure. No court can review their action. They may discharge him the next day after he arrives at the prison, but, worse than this, they may keep him confined for 15 years. If the board are honest men, the term of imprisonment depends on his behavior after he enters the prison. If they are not honest, it depends solely on their will. When the convict, in whose interest so-called humanitarians have devised this matter of indeterminate sentence for his reform, enters the prison, he becomes the servant and slave of the prison board, and no court in the country has any power to protect his rights or redress his wrongs. Their discretion is not reviewable by the courts; it is arbitrary.

The supposed action of the judge in manslaughter cases is exemplified by the action of the circuit judge in the case before us. He was desirous of sentencing Cummings under the indeterminate law. If he had imposed the sentence in accordance with the statute, the maximum term would have been five years, and the minimum, imprisonment for one day, or a fine of one cent. The court thought, however, he ought to go to prison two years at least, and not more than four years, so the sentence was to be—

"Confined in the State House of Correction and Reformatory at hard labor for a period of not less than two, nor more than four, years, from and including this date, in the discretion of the board of control of prisons of the State of Michigan."

The court fixed the minimum and maximum, and gave the board a leeway between in which to use their discre-

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tion. Here the circuit judge used some discretion and delegated some to the board; but, under the act, he must delegate it all to them, or not sentence under the statute at all.

We have held that a circuit court commissioner could not, although going through the forms of a judicial proceeding, release a prisoner from confinement by a writ of *habeas corpus*, because no judicial power is vested in such officer. *In re Buddington*, 29 Mich. 472; *In re Burger*, 39 Id. 203. The Legislature cannot confer judicial power upon any officers not specified in the Constitution. *Chandler v. Nash*, 5 Mich. 409. It was held in *People v. Brown*, 54 Mich. 15, that the pardoning power in this State belongs to the Governor alone, and that no judge can exercise it by indefinitely suspending the sentence of a convicted criminal; yet, under the law before us, the circuit judge by his sentence may delegate the power to the prison board to release a prisoner, and, in effect, pardon him in many cases the first day that he is imprisoned.

But it is claimed that the pardoning power is not granted to the board of control by this statute, because there is no authority to discharge prisoners absolutely conferred upon the board. It is argued that the power granted by this act is only to permit prisoners sentenced under it to go upon parole in the legal custody and control of the board, subject at any time to be taken back within the inclosure of the prison. If this be so, what is meant by this parole, and what is the power of the board? Can they let one man out, not to go beyond a five-mile limit, another to keep within the county where the prison is located, the third to keep within the congressional district, the fourth not to go outside the State, the fifth to keep himself within the limits of certain states of the Union, the sixth not to leave the United

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States, and the seventh not to visit England, and the others confined to certain localities, at the will and pleasure of this board? Or does the law contemplate that this parole shall be in fact a release from prison, with only the condition that the board may bring the person on parole back again if they see fit, and make him serve his whole unexpired maximum term within the prison walls? In any event, this parole system is as obnoxious to the Constitution as an unconditional release by the board would be; and, if they have the power to release on conditions, those conditions may be made so trifling as in fact to be no conditions at all. In the case of *People v. Reilly*, 53 Mich. at page 263, the present Chief Justice of this Court, in speaking of the action of the circuit judge in permitting a convicted person to go upon his own recognizance for over a year, and then calling him into court and sending him to State prison for four years, said:

"If the judge entertained serious doubts of his guilt, he should have recommended the Governor to pardon the respondent; and, if he entertained no serious doubts of his guilt, he should have pronounced judgment, instead of setting the criminal at large upon his own recognizance. If such power can be exercised by a judge, it incorporates into our administration of the criminal law the 'ticket-of-leave' system of the English judicature, without its surveillance and checks, and places the criminal at the caprice of the judge, subject to be called up for sentence at any time. If the judge can delay the sentence one year, I do not see why he may not fifteen years. An exercise of such power, in this age, would be no less revolting to our sense of justice than was the exercise of such power in the reign of James I., when he sent Sir Walter Raleigh to the block fifteen years after his conviction."

This law introduces the "ticket-of-leave" system, and places despotic powers in the hands of the prison board over the persons sentenced under this statute.

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If all there is to this law is this system of parole, as contended by the counsel for the people, then it cannot stand under our ruling in *People v. Moore*, 62 Mich. 497. In that case it was held that the agent or keeper of a prison could not arrest and bring back into the prison a convict pardoned by the Governor on conditions, for a violation of such conditions, unless such convict was arrested, held, and tried for such violation in the same manner as other offenders against the criminal laws. The Governor has the undoubted right to pardon. He may pardon on conditions; but neither he nor any other person can have, under our laws, the sole right to determine whether or not such conditions have been violated. This must be determined by the courts by the usual and proper proceedings. The act of the Legislature in that case, authorizing the arrest of such a pardoned convict, without a warrant, for an alleged violation of the conditions of his pardon, was held unconstitutional and void. The writer of this opinion (page 500) said in that case:

"When a person has been set at liberty under the pardon or the commutation of his sentence by the executive, he becomes once more a full citizen, clothed with all the rights, privileges, and prerogatives that belong to any other freeman. He cannot be sent out half free and half slave. He is not to be let out with a rope around his body, as it were, with one end in the hands of the warden, to be hauled back at the caprice of that officer. He must go out a free man, and remain a free man until he breaks the condition of his pardon. He must enjoy the blessings and benefits that belong to an American citizen until he has violated the law of his release. His character may be tarnished and his reputation soiled by his imprisonment, but his rights as a citizen are unimpaired. He is clothed, as he passes out of the prison door, with the same garb of freedom that was removed from him when he went in.

"He has a right to his liberty the same as any other

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citizen, so long as he keeps the condition of his pardon, and he cannot be deprived of that liberty save in the mode prescribed by the Constitution and laws of our State, as applied to any other citizen. If the breaking of the condition is in the nature of a crime, or punished as such, with penal consequences, that crime, or act punished as a crime, must be established as any other crime would be. He is presumptively innocent until proven guilty, and his guilt must be established under the due forms of law, and by the same processes applied to others. There can be no special legislation separating him, in his rights and privileges, from his fellows, and shackling some of his prerogatives.

"As none, under our institutions, are entitled to special privileges, so none can be shorn by special legislation of any portion of their rights and franchises as freemen. If a condition is imposed that he shall not do any thing or things, this does not hamper or abridge his rights or liberties until the condition is broken; and, in order to remand and confine him in prison again, the fact of the violation of such condition must be established by the due administration of the law, as in other cases of the violation of the penal statutes.

"The authority conferred upon the agent of the State prison, or the keeper of any other penal institution, to arrest and detain such person in his prison or house of correction, without complaint or warrant, and to keep him there without bail, and without preliminary examination, as a convict, until the prosecuting attorney of the county may choose, when the next term of court opens, to file an information against him, cannot be tolerated or permitted under our Constitution, and is repugnant to the spirit of our institutions.

"By the operation of this statute, the person pardoned and absolved from the penal consequences of his crime, we must presume for good cause, is not free upon his release. He is subject to the will of a master. The warden or other official can reach out his hand at any moment, and pull him back into prison, governed by no restrictions save the will of the officer. When the warden's hand is laid upon the released convict, he becomes his absolute servant and prisoner until the prosecuting attorney gets time or sees fit to move. This arbitrary power and authority over the liberty of another is pos-

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sessed by no other officer in our government, in times of peace. It cannot lawfully exist in a free country."

This language applies with still more force to the act before us, for here neither the prosecuting attorney nor the court can intervene between the board and the convict. This law is subject to the same infirmity and is more pernicious. Any convict thus released on parole can at any time be brought back into the prison upon the written order of the board, which all officers must obey. All that is necessary is for the board to enter a formal order that the convict is a delinquent,—has violated the conditions of his parole,—and that is the end of it. The convict is not to have a hearing, and no court has power to interfere in his behalf, if this law is constitutional. Nor is this all. He is to be treated thereafter as an escaped prisoner, owing service to the State, and loses the time even that he has earned by keeping the conditions of his parole perhaps for years; and if he commits another crime while he is at large upon his parole, and is convicted thereof, his new sentence is deferred until he has served out his old, meting out to him double punishment for his last crime.

I have not sufficient words at my command to use in condemnation of this statute. It would fill our State with convicts—they could not be called freemen—running at large outside of our prison walls, all liable at any moment to be taken back inside at the will of four individuals, no better probably in their impulses and caprices than the average man. These people thus at large would not only be subject to the will and pleasure of their masters, without hope of redress if wronged by them, but they would be out of prison under various conditions, and such as the board might impose upon them, without regulation or restriction from any other power or authority,—one under the condition that he shall drink no

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intoxicating liquor, and another that he shall not chew tobacco, and still another that he shall not use opium or drink strong coffee. There is no limit or qualification to the conditions that may be imposed.

In looking upon this law, it is difficult to see in what respect this system of parole differs from a pardon by the Governor upon conditions. Is it not in fact a pardon,—a release upon conditions? If it is not, if the faith of the board of control is not to be kept, and the convict has no certainty that if he keeps the conditions he will not be again imprisoned, then the whole scheme is a delusion and a snare, and unworthy a place upon the statute-books. But, as it is, the only guaranty of a person so released of such good faith is the pleasure of the board.

This system of parole is either a pardon upon conditions, and therefore unconstitutional, or it is no release at all, and only a permission to go outside of the walls, and stay as long as the board may will. If it is the latter,—a simple leave to stay outside until the board see fit to call them in,—the law evidently does not meet the intention of the Legislature, and is not only undesirable, but indefensible. If it is a pardon upon conditions, as the Legislature no doubt intended it should be, then it is open to all the constitutional objections mentioned in *People v. Moore*, 62 Mich. at page 502.

The term of imprisonment under this law depends, not upon the character of the crime committed, but upon the behavior of the prisoner after he enters upon his sentence. The prisoners are to be classified into different grades—

"With promotion and degradation, according to the merits of the prisoners, their employment and instruction in industry, and generally, as may from time to time appear to be necessary or promotive of the purposes of this act."

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The hardened criminal may more easily submit to the discipline of the prison than the younger, but more impulsive, offender, and therefore get his release sooner. The term of imprisonment depends upon the ability of the convict to please the prison officials in his deportment, and not upon the enormity of his offense.

This law, if permitted to stand, would be a convenient one for judges who might dislike to perform an unpleasant duty. When a person of influence or wealth was convicted, and the usual pressure in such cases brought to bear upon the trial judge to impose a light sentence, how easy it would be to impose a general sentence, and shift the responsibility of fixing its actual term upon the board of control of prisons, and let them stand the siege, which would at once commence, to procure his release. The law, in my opinion, is not only unconstitutional, as heretofore pointed out, but also wrong in theory and dangerous in practice. That such laws have been adopted by some of the states of the Union has no bearing in favor of this act. A similar statute was sustained in Ohio, but the reasoning of the opinion is not at all satisfactory to me, and does not meet the objections raised against the law. See *State v. Peters*, 43 Ohio St. 629 (4 N. E. Rep. 81).

It is also urged in support of this law that it is no more despotic and arbitrary than the law providing for a deduction of time from each year of the sentence of a convict who has not infracted the rules of the prison during that time, and it is asserted that the constitutionality of such law has lately been recognized by this Court. *In re Walsh*, 87 Mich. 466. But there is a material difference between the two enactments. How. Stat. §§ 9703, 9704, provide for a certain reduction of the sentence for good behavior. It is not left at the will or caprice of any one. It is provided that the rules of

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the prison shall be known to the convict, and that they shall provide what the penalty shall be for an infraction of such rules; that a record shall be kept; and that the rules shall be definite and certain, and apply to all the convicts alike. Such a law was sustained in Massachusetts (13 Gray, 618), upon the ground that the sentences were not rendered indefinite or uncertain thereby, the judges saying in the opinion:

"The scale of deduction is not to depend on any varying or capricious notions which any officers or superintendents of the prison may entertain of the good behavior or good disposition of a convict. It is made to depend upon a fact, ascertained by a fixed rule, entered on the journals of the prison, recorded each month; that is, entered in a book permanent in its character, fixed and unchangeable when once entered. These books of record are always accessible, and, although the officers may all change, the record is there."

We also held in the Walsh case that the enforcement of our statute, and the deduction of lost time under it, could not be left to the will or caprice of any prison official, and that the prison board could not alter or change a record once made to militate against a prisoner; that it must be enforced under fixed rules, known to the convicts; and that the record must be so kept that the convicts would not be left at the mercy of the mistakes of prison officials. Yet, as plain as these statutes are, in the Walsh case it was found that, ever since the passage of this law allowing deductions, the prison board had disregarded the statute, and built up a system of their own, which was unjust and pernicious, as well as indefinite and uncertain in its operation. But the law under consideration goes further, and proposes, without regulation or restriction, to give the prison board almost unlimited authority as to the release and discharge of prisoners, without the control of the courts, and without any appeal to any earthly power. It may further be said that the

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statutes in relation to deductions do not give any power to the board to extend the term of imprisonment. The law under consideration does. In order to sustain the statute, it must be argued and considered that the convict is really under sentence all the while; that he is still a convict, although outside the walls of the prison. He is as much under the control of the authorities as is the "trusty" convict, who is allowed at times to be outside at work or to run errands. Yet, if he violates the conditions of his parole after he has been out 10 years,—if his maximum term has not expired,—he can be taken back without trial, or any investigation save by the prison board, and made to serve the 10 years beyond his maximum term. See section 5 of the act.

It is a wonder to me that such a law as this, giving such unheard-of power to four men, not elected by the people, but holding their offices by appointment, could have been enacted, in view of our Constitution, and the whole theory of our State government, and in the light and example of the history of the establishment and growth of constitutional liberty in this country.

In this case the sentence of Cummings is good, under our previous decisions, for two years; at the end of that period he must be discharged.

CHAMPLIN, C. J., MCGRATH and LONG, JJ., concurred with MORSE, J.

GRANT, J. *(dissenting).* Upon conviction for the crime of larceny, the respondent was sentenced by the court—

"To be confined in the State House of Correction and Reformatory, at hard labor, for a period of not less than two, nor more than four, years, from and including this date, in the discretion of the board of control of prisons of the State of Michigan."

In imposing this sentence, the court evidently intended a compliance with Act No. 228, Laws of 1889. I do not

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think this conforms to the statute. The sentence there provided is a general one, and does not confer upon the court the power to fix a minimum sentence. The only sentence provided in this act is that the convict be confined in one of the places mentioned. He can then only be released before the expiration of the maximum term of confinement fixed by law by the board of control, unless pardoned by the Governor. The sentence, however, is an absolute one for two years, is therefore legal, and must be sustained.

While the constitutionality of this act is not necessarily involved, yet as it has been presented by counsel, and a speedy determination of the question seems to be required by public interests, we have concluded to dispose of it. Its constitutionality is challenged on two grounds:

1. Because it interferes with the pardoning power, which is alone possessed by the Governor.
2. Because it confers judicial powers upon the board of control, which, by the Constitution, are solely vested in the courts.

Sentence under this act is not made compulsory, nor does it take away the discretion lodged by the Constitution in the courts. It but gives to the courts the power to sentence under this act if, in their judicial discretion, they choose to do so. They may still impose a determinate sentence under other statutes, in which cases the provisions of this act do not apply. But if, in their judgment, in view of the circumstances of the particular crime, and the character of the criminal, they deem it for the interests of the criminal, as well as of society, they may impose sentence under this act. The constitutional power of the courts is neither abridged nor enlarged. The character and extent of the punishment are clearly within the exclusive control of the Legislature. If, therefore, the act is to be declared unconstitutional,

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it must be because it warrants an unconstitutional interference with the judgments of the courts. A careful examination, therefore, of the power conferred upon the board of control, is necessary to a proper determination of the question.

We may pass without discussion the claim that it interferes with the pardoning power of the Governor. The act does not attempt to confer any power upon the board to pardon.

"A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." *U. S. v. Wilson*, 7 Pet. 150.

Section 6 expressly declares that nothing in the act shall be construed to impair the power to grant a pardon or commutation in any case.

This act was copied from that enacted in Ohio in 1884, which was held constitutional by the supreme court of that state. *State v. Peters*, 43 Ohio St. 629. Other states have also adopted similar provisions. The object of this law is well stated in the opinion in the Ohio case, viz.:

"It is evidently prompted by a desire to reform, as well as to punish; to make better those under sentence, as well as to protect society."

A similar law has been sustained by the supreme court of Massachusetts. *Conlon's Case*, 148 Mass. 168 (19 N. E. Rep. 164).

The only additional power conferred upon the board by this act is to allow prisoners sentenced under it to go upon parole outside the buildings and inclosures, remaining while on parole in the legal custody and under the control of the board, subject at any time to be taken back within the inclosure of the prison. This is the power, if any, which is judicial, and therefore unconsti-

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tutional. The term of his release depends upon the observance of the conditions of his parole. This is left with the board to determine, but I do not think this a judicial act. If the power exists to let a convict out on parole, upon such terms and conditions as the board shall establish and the convict agree to, I think it competent to clothe the board with the power to determine when his parole is broken. The convict agrees to this as one of the terms of his parole.

The power of the Legislature to interfere with and modify the sentences of prisoners by the courts has long been recognized in this and other states, and in so doing it has never been thought that the legislative authority was encroaching upon the judicial authority. The following are illustrations from our own statutes: The law requires the courts to sentence murderers of the first degree to solitary confinement at hard labor in the State prison for life. The law also confers upon the inspectors of the State prison the power to release such convicts from solitary confinement, to employ them as other convicts, and to allow them to correspond with their relatives and friends. For 14 years the law of this State has provided that every prisoner, who shall have no infraction of the rules of the prison or laws of the State recorded against him, shall be entitled to a deduction for each year of his sentence. The validity of this act has been recognized in *mandamus* proceedings brought to this Court by a prisoner in the Jackson prison, and the board directed to allow the prisoner his good time. *In re Walsh*, 87 Mich. 466. This deduction is two months each year for the first two years, and finally amounts to six months each year. How. Stat. § 9704. This record must be kept by the warden, and then the inspectors are required to determine how much of the good time earned shall be forfeited for one or more violations of the prison

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rules. Is it not apparent that these two acts of the Legislature constitute as much of an interference with the judgments of the courts as does the act now under consideration? The effect of both is to modify the sentence of the court. In both, discretion is lodged with the prison managers. Yet the validity of the former acts has never been questioned. The power invested in our prison managers is just as "despotic" in the one case as in the other. In fact, all these laws are humane, and their tendency is to reform criminals and protect society. Such laws should only be held unconstitutional when there is a clear infraction of the Constitution.

It is clearly the prerogative of the Legislature, under the Constitution, to fix all punishments for crime, and to provide for a minimum and maximum punishment. It is only limited by the Constitution to the rule that they must not be cruel or unusual. The Legislature by this act has given the courts the power and discretion to sentence a dangerous criminal to prison for the maximum term, and conferred the power and discretion upon the board of control, whose duty it is to watch the conduct and character of the convict, so to modify that sentence as to give him temporary and conditional liberty. I am unable to see in this any cruel or unusual punishment, or any usurpation of, or encroachment upon, judicial powers as fixed by our Constitution. If the constitutional power exists in the Legislature to provide for the absolute discharge of a prisoner before the expiration of his term of imprisonment fixed by the court, it must follow that the right exists to provide for his conditional release. No constitutional right of the prisoner is infringed, for his term of imprisonment may be thereby shortened, while society may be benefited by his reformation. The right to shorten terms of imprisonment was sustained by

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the supreme court of Massachusetts, Chief Justice Shaw being then upon the bench. 13 Gray, 618.

To declare this act unconstitutional would result in the abrogation of our most salutary laws, holding out wise inducements for the reformation of criminals. It would result in the discharge of many prisoners who have been sentenced under this act, the validity of which appears to have been generally recognized by the circuit judges.

It should be accordingly certified to the State House of Correction and Reformatory at Ionia that the sentence of the court is valid for two years, subject to the deduction provided in How. Stat. § 9704.

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MARGARET WHITNEY v. THE CITY OF PORT HURON.

Municipal corporations—Presentation of claim to council—Payment of taxes under protest.

1. Where, after the presentation to a city council of a claim for taxes paid under protest, four meetings of the council are held without any action being taken regarding the claim, a suit brought at the expiration of thirty-six days from such presentation, and two days after the last council meeting, is not premature, under a charter provision barring such action if commenced before the council have had a reasonable time to investigate and pass upon the claim.

2. If a citizen's property is threatened with seizure under a tax warrant, or his real estate is advertised for sale to satisfy delinquent taxes, he is, equally in both cases, entitled to free his property by the payment of the tax under protest, which payment will not be considered voluntary.

3. The decision in *City of Detroit v. Martin*, 34 Mich. 170, that the payment under protest of a tax levied under an unconstitutional law, where the officer had no authority to compel

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such payment otherwise than by a sale of land, is a voluntary payment, does not apply to a case where the law under which the levy is made is constitutional, and the illegality of the tax is claimed because of irregularities or defects in the statutory proceedings.

4. Where a tax-payer claims that the whole proceedings for the grading and paving of a street are void for want of jurisdiction, and on paying the taxes assessed against him on account of such improvement there is indorsed on the tax receipt a statement that the payment is made under protest, to protect the property from being sold, and on account of taxes being illegal, the protest is sufficiently specific.

Error to St. Clair. (Canfield, J.) Argued May 20, 1891. Decided November 13, 1891.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Frank T. Wolcott (*O'Brien J. Atkinson*, of counsel), for appellant.

Frank Whipple, for plaintiff.

MORSE, J. The plaintiff sues to recover taxes paid by her under protest on a special assessment levied for the paving of Pine Grove avenue, in the city of Port Huron. She had judgment in the court below, the verdict of the jury being directed by the circuit judge in her favor.

The first objection to this judgment is that the plaintiff had no right to sue at the time she did. The charter of Port Huron in force at the time this suit was commenced provides that it shall be a sufficient bar and answer to any action or proceeding in any court for the collection of any demand against said city that it was never presented to the council, or, if presented, that the suit was brought before the council had reasonable time to investigate and pass upon it. Local Laws of 1885, p. 496. The plaintiff presented her claim to the common council, and it was read at a meeting of that body held

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December 6, 1886. Meetings of the council were afterwards held December 13, December 20, January 3, and January 10, at which meetings no action was taken in regard to plaintiff's claim. The plaintiff brought suit January 12, 1887, and waited long enough before she did it.[1]

It is also claimed that her payment of the tax was voluntary. The tax was paid April 2, 1886, and across the face of the receipt was written as follows:

"Paid under protest, to protect property from being sold, and on account of taxes being illegal."

The city treasurer had advertised the plaintiff's property for sale, and she had the right to presume that he would proceed with the sale. The fact that the sale would have conveyed no title to the purchaser on account of the illegality of the tax, or that she could have removed the cloud upon her title caused by such sale by legal proceedings, had no bearing upon her right to pay the tax under protest, and thereby stop the sale. Nor was it any the less an involuntary payment under the law. If because a tax is illegal, and a sale of property under it would be void, a payment to prevent the seizure or sale of one's property cannot be considered as an involuntary payment, then our statute providing for the payment of taxes under protest would be of no force or use. If the citizen's property is threatened with seizure under a tax warrant, or his real estate is advertised for sale to collect delinquent taxes, he is, equally in both cases, entitled to free his property by a payment of the tax under protest, and such payment will not be considered voluntary.

It was held in *City of Detroit v. Martin*, 34 Mich. 170,

[1] It was held in *Crittenden v. City of Mt. Clemens*, 86 Mich. 220, that the presentation of a verified claim for taxes paid under protest was a condition precedent to bringing suit for their recovery.

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that one who has full knowledge of all the facts, being conclusively presumed to know the law, is presumed to know that an assessment, laid under a statute which is *unconstitutional and void*, cannot be made the basis of a sale that could constitute any cloud upon his title, and therefore to know that he could not be injured by it; and that a payment of a tax under protest in such a case, where no seizure of goods or of the person had been made or threatened, and where the officer had no authority to compel payment otherwise than by a sale of land, which could injure no one, would not be other than a voluntary payment, as a protest would not change the character of the payment. It was held also that a sale of the land under such circumstances would not create a cloud upon the owner's title. This may be good law when applied to proceedings under an unconstitutional enactment, which is no law, and is held to confer no rights upon any one, as all must be presumed to know that it is unconstitutional and void; but it cannot be applied to cases where the statute under which the proceedings to levy the tax are taken is constitutional, and where the illegality of the tax is claimed from irregularities or defects in the statutory proceedings. If it were so, it would require of the land-owner a greater knowledge of the law than attorneys, or even courts, possess. For instance, in the present case able attorneys for the defendant are claiming that the tax paid by plaintiff was a legal one, and that all the proceedings in assessing it were lawful; yet at the same time they argue that, if it should be determined by this Court to be illegal for any reason, then the plaintiff's payment must be considered a voluntary one, and she cannot recover what she has paid, because she and every one else are presumed to know that the tax is void, and that a sale under it could convey no title, and therefore cast no cloud over her title.

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But the fact remains, as every one knows, that a tax deed or any other purported conveyance of land does cloud the title, and that it can never be sold or exchanged as readily, and seldom for as great a price, as when unincumbered, although it may be patent to the courts that such deed or conveyance is void and of no consequence, so far as the holding of the title is concerned; and, in my opinion, the owner of the land has the right, in law and equity, to treat every such tax deed or other conveyance as a cloud upon his title, and to take such steps to get rid of it, or to prevent its issue or record, as the law authorizes when the title is actually clouded as defined by some of the authorities.

A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. Anything of this kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is, in my judgment, a cloud upon his title which the law should recognize and remove.

The third objection is that the protest of plaintiff was not sufficiently specific. Across the face of the receipt for the taxes paid by the plaintiff was the following:

"Paid under protest, to protect property from being sold, and on account of taxes being illegal."

In support of this objection we are cited to *Louden v. East Saginaw*, 41 Mich. 26; *Peninsula Iron & Lumber Co. v. Crystal Falls Tp.*, 60 Id. 514; *Peninsula Iron Co. v. Crystal Falls Tp.*, Id. 79. The last two cases do not apply, as the protest was made under a special statute. In *Louden v. East Saginaw* the objection to the tax did not go to the jurisdiction of the city to enter upon the work, but to irregularities in the assessment of the tax,

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and it was held that the plaintiff should have pointed out more specifically his reason for his objections to the tax, and why he asked that the assessment against him should be refunded. It was said:

"The case stands, therefore, on a very different footing from one relating to an entirely illegal assessment. The only illegality here was in a notice which may or may not have been seen by the parties." *Louden v. East Saginaw*, 41 Mich. at page 22.

In the present case the claim is that the whole proceedings were void, and without jurisdiction. A case involving the legality of the proceedings to pave Pine Grove avenue had been decided in this Court before the council were asked to refund this money, and that body then well knew that the whole proceeding had been declared void for want of jurisdiction, for the reason that the resolution providing for the grading and paving of the street had not been approved by the mayor as provided by the charter of Port Huron. *Twiss v. City of Port Huron*, 63 Mich. 528, 532.

An attempt is made in this case to break the force of the ruling in the Twiss case by attempting to show that the resolution was shown to the mayor, and was "approved by him, so far as passing judgment upon it and assenting to it could go." The mayor testifies that when he went into office it had not been the custom of the mayor to sign the resolutions; it was thought the signing of the journal was sufficient. He could not tell whether this particular resolution was presented to him by the clerk, or whether he signed it; but he testified that the resolution, when on its adoption before the council, was read in his hearing, that he put the motion for adoption, and declared it carried, and that he passed his judgment upon it, and approved it. But this judgment and approval

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rests upon oral testimony, and is not evidenced by writing, as the charter at that time provided it should be. He did not write his approval upon the resolution, and sign the same. The approval of the journal did not comply with the charter. It was his duty to approve the journal if the proceedings of the council were therein correctly transcribed, whether he approved of this resolution or not. The case, in this respect, must be governed by the majority opinion in the Twiss case. It is not necessary to discuss the case further.

The judgment is affirmed, with costs.

The other Justices concurred.

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THE PEOPLE v. FRANK UMLAUF.

Criminal law—Giving false pedigree of an animal—Evidence.

1. An unregistered account of the strain of an animal, especially where it, as well as its ancestry, has changed hands a number of times, must necessarily be based upon hearsay.
2. *Actual knowledge* and intent to defraud must be shown in order to warrant the conviction of a respondent under Act No. 9, Laws of 1887 (3 How. Stat. § 9209*d*), which makes it a criminal offense to give knowingly a false pedigree of any animal, with intent to defraud.

Exceptions before judgment from Macomb. (Canfield, J.) Argued June 17, 1891. Decided November 13, 1891.

Information under Act No. 9, Laws of 1887, for giving a false pedigree of a horse, with intent to defraud. Conviction set aside. The facts are stated in the opinion.

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Crocker & Crocker, for respondent.

A. A. Ellis, Attorney General, and *James G. Tucker*, Prosecuting Attorney, for the people.

McGRATH, J. The defendant was convicted upon an information which charged that he,—

"With intent to cheat and defraud one George Bacon, and obtain from him, the said George Bacon, the sum of $300 in money as the price of a certain stallion, then and there owned by him, said Frank Umlauf, and which he, the said Frank Umlauf, then and there offered for sale to the said George Bacon, said stallion being then and there named 'Frank,' did knowingly give to him, the said George Bacon, a certain false pedigree of the said bay stallion Frank, then and there owned as aforesaid by the said Frank Umlauf, which said false pedigree was printed upon a certain card given to the said George Bacon by the said Frank Umlauf, and was as follows:

"'FRANK.

"'Bay stallion, foaled on June 27, 1882, by Bill Weller; he by Scotia, the sire of Ned Weller, 2:29½; Roachmaine, 2:22; Jackson (stallion), 2:40½; dam Clydesdale, sired by Clydesdale Jock, no record; by Ricks' Royal George, 2:27½; by St. Lawrence, Jr.; by St. Lawrence.'

"He, the said Frank Umlauf, then and there well knowing the said pedigree so given by him to the said George Bacon of the said stallion Frank to be false."

The statute (Act No. 9, Laws of 1887, 3 How. Stat. § 9209*d*) under which the conviction was had reads as follows:

"SECTION 1. *The People of the State of Michigan enact*, That every person who knowingly or designedly by means of any false pretense shall obtain from any club, association, society, or company for improving the breed of cattle, horses, sheep, swine, or other domestic animals, a certificate of registration of any animal in the herd register or other register of any such club, association, society, or company, or a transfer of any such registration, and every person who shall knowingly give a false pedigree of any animal, with intent to defraud, upon conviction thereof, shall be punished by imprisonment in the State prison for a term

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not exceeding three years, or in a county jail for a term not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment, in the discretion of the court."

The defendant testified that he did not know how the horse Frank was bred; that one Peltier told him that he (Peltier) knew all about the horse, and had known him since he was a year old.

"I knew nothing about it. I cannot read. I know that there is a picture of a horse on the card; that is all I know. I suppose the pedigree handed me was right. I don't know whether it is right or not. I supposed it was right."

It appeared that one Tripp had at one time owned the horse, and had bought it from one Tebo; that Tripp had handled the horse for defendant, and that it was through Tripp that Umlauf purchased the horse from one Allor.

George Bacon, the complaining witness, testified that at the time of the purchase of the horse witness asked defendant if he had a pedigree of the horse, and he said, "Yes."

"He stepped behind the counter, got it, and gave it to me. I asked if it was a true pedigree, and he said it was."

It further appeared that eight or ten cards of the kind set up in the information were printed at the Monitor office; that the copy from which they were printed was in the handwriting of one Gibbs, and was brought to the office by Gibbs. Gibbs testified that he wrote the copy at Tripp's direction; that Tripp gave him the pedigree of the horse, and he simply did the clerical work; that Tripp referred him to one Peltier, and witness asked Peltier about certain points in the breeding, and witness used the information; that he relied upon Tripp and Peltier, and talked with no one else; that he had no talk with Umlauf about it, except that afterwards he met

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him, and Umlauf asked him if he saw Tripp about some bills for his horse, and "I said, 'Yes, they are printed;' and he paid me for them. That is all the conversation I ever had with him." Tripp is called, is shown the card, and says:

"Well, part of this is, as near as I can judge, right, and the balance I don't consider I can give you. I traded and got the horse myself, and I got the horse with the pedigree I gave Gibbs. I got it from Charles Tebo. He told me just the same as I told Gibbs. I told him the way he told me. Tebo told me he was from St. Lawrence, and out of a Clydesdale and Hambletonian mare. Umlauf was with me when I done the trading. He held the horse, while I went to look at the stallion and hitch him up. I didn't give Gibbs a copy. I got the facts about the pedigree of the horse from Tebo. I did not get them from Umlauf. Umlauf knew nothing about the pedigree of the horse. I told Gibbs the same as I told you now; and if Umlauf had anything to do with the pedigree, I don't know anything about it."

One Allor testified that—

"The day Umlauf and Tripp came down and traded with me I told them the sire of Frank was the Bill Webb horse. I did not give them any such information as that on the card. Frank was foaled in the spring of 1880. When Tripp and Umlauf came down there, Tripp done the talking. Umlauf did not say a word about the trade. The horse was a good horse, worth $300 for breeding, when I let him go."

Alva Bacon, son of complaining witness, testified that defendant told him that the card was a true pedigree of the horse. One Cottrell testified that Ned Weller never had a record of 2:29½, nor had Roachmaine one of 2:22, but both had quite a local reputation. All this testimony except that of the defendant was brought out by the prosecution. It further appeared that Jackson, Scotia, and St. Lawrence were horses of local reputation, and one witness testified that there was no special breeding in any of the horses named; that not a single horse

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on the list would be considered of the least value in the world by horsemen, except as a common all-work horse; that there is not a standard horse's name in all the lot; that Ned Weller was just a good roadster.

Upon this record it does not appear that there was any testimony tending to show that defendant knowingly gave a false pedigree of the horse with intent to defraud. It appeared that the horse was sired and foaled in the immediate neighborhood, and that several of the horses named in the card were neighborhood horses of local reputation. The horse in question was nine years of age, and had passed through several hands before reaching defendant. There was no record kept of his lineage. It rested in memory alone. Tripp claims to have obtained his information from Tebo, and Allor claims to have informed Tripp. Gibbs obtained his information from Tripp and Peltier, and Tripp and Gibbs do not agree. Umlauf did not contribute any of the matter put into the card. He could not read it when printed, and the proofs do not show that he knew what representations the card contained. In an action to recover back the purchase money it might be sufficient to show that the information contained in the card was false, without proof of either knowledge of its falsity or intent to defraud, but here both knowledge and intent must be shown; and, while the intent to defraud might be inferred from actual knowledge, it cannot be presumed in the entire absence of proof of knowledge. It may be true that Allor "told them" that the sire of Frank was the Bill Webb horse, and that he was foaled in the spring of 1880, although it may well be doubted whether that information came home to Umlauf; yet it was not shown that he had any knowledge that the card contained any other representations.

An unregistered account of the strain of an animal,

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especially where that animal, as well as its ancestry, has changed hands a number of times, must necessarily be based upon hearsay, and the Legislature has wisely made guilt dependent upon actual knowledge and intent to defraud.

The conviction must be set aside, and a new trial ordered.

The other Justices concurred.

MARY J. WILLIAMS v. NEWEL KILBURN.

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Marriage—What constitutes.

Pending a suit by a wife for divorce, she remarried, and, after securing a decree, lived and cohabited with the second husband as his wife, under the belief that another marriage ceremony was not necessary, induced by his statement that he had been so advised by good counsel, and his agreement, which was kept, to make his will in her favor, and deliver it to her for safe-keeping. And it is held that the formal marriage ceremony may be treated as evidence, with what subsequently occurred, of the nature of the relation which the parties assumed and occupied, and that the facts establish a valid marriage; citing *Hutchins v. Kimmell*, 31 Mich. 126; *Peet v. Peet*, 52 Id. 464.

Error to Shiawassee. (Newton, J.) Argued October 6, 1891. Decided November 13, 1891.

Case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

A. R. McBride, for appellant.

A. L. Chandler, for defendant.

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McGRATH, J. Plaintiff commenced by *capias*.

In the affidavit therefor she sets forth—

That in 1878 she married one Williams, who became a common drunkard, and abandoned her; that in April, 1886, defendant offered to pay all expenses of a divorce for her if plaintiff would marry him after such divorce was obtained; that defendant said to her that he had $2,000 in cash, and some personal property, together with a life-lease of 40 acres of land, all of which would be used for their support during his life, and at his death would go to plaintiff; that, after repeated entreaties, plaintiff consented to marry him; that plaintiff then made application for a divorce from Williams; that in June, 1886, at defendant's earnest entreaty, plaintiff and defendant were married; that it was then agreed that plaintiff and defendant should not live or cohabit together until after plaintiff had obtained her divorce; that in September, 1886, the divorce was granted; that thereupon defendant wanted plaintiff to live and cohabit with him, but plaintiff refused for some time, insisting upon another marriage ceremony; that defendant advised her that he had consulted good counsel, and that another marriage was not necessary, and "to show her that he was in earnest he would immediately go with her to a lawyer, and have his will made, giving this deponent all of his property, which was expected to consist of the $2,000 he then had in the bank and the avails of his horse and carriage, and that he would give such will to this deponent for safe-keeping, so that it could neither be lost nor destroyed without deponent's consent; and he did actually go with this deponent to an attorney and have his will made, giving this deponent all his property, in said will calling this deponent his beloved wife, and handed the same to this deponent.

"This deponent, then and there believing and relying upon the statements of said Kilburn, took him home with her to live as husband and wife, where he stayed, treating this deponent as his wife, until October, 1889, when, without notice or warning to this deponent, he took his property and money in bank, and went to live with his son Albert, giving his son all his money, as he says, to keep him the rest of his life, thus rendering the will valueless. Deponent says, from October, 1886, to

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October, 1889, said Kilburn lived with her in her house, using her furniture, where she did weaving to support them. She says that said Kilburn now refuses to have a legal marriage performed as he had agreed to do prior to deponent's taking him into her house, and that just prior to his leaving, in 1889, he told deponent's neighbors that he was not legally married, and he was going to leave deponent with nothing.

"Deponent says that by reason of the premises aforesaid she has been grossly wronged, injured, and deceived by said Newel Kilburn, and damaged, whereby a cause of action has arisen to this deponent in an amount of damages of $2,000."

The declaration counts upon the matters set forth in the affidavit, and upon a breach of defendant's promise of marriage. Defendant demurred to the declaration, the demurrer was sustained, and upon motion the writ of *capias* was afterwards quashed and set aside, and plaintiff appeals.

There was no error in the judgment of the court below. The facts set forth show that, after plaintiff obtained her divorce, it was agreed that they should live and cohabit together as man and wife, which they continued to do for three years thereafter. The formal marriage ceremony may be treated as evidence with what subsequently occurred, of the nature of the relation which they assumed and occupied. These facts establish a valid marriage, and plaintiff's rights grow out of that relation. *Hutchins v. Kimmell*, 31 Mich. 126; *Peet v. Peet*, 52 Id. 464. Her remedy is that of a married woman against a deserting husband.

The judgment is affirmed, with costs.

The other Justices concurred.

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NELSON DELONG AND JAMES O'HARA v. THE MUSKEGON BOOMING COMPANY.

Principal and agent—Employment of attorneys—Estoppel—Evidence—Conduct of counsel.

1. The questions involved in this case are the authority of the defendant's book-keeper to employ plaintiffs to defend garnishment proceedings prosecuted against the defendant, and its knowledge that plaintiffs were conducting such suit in its behalf; upon both of which it is held there was testimony warranting the charge of the court, and sufficient to go to the jury.
2. It was reversible error to refuse to permit defendant's president to testify why he did not employ counsel in the suit after being advised of its progress, and of the appearance of plaintiffs as attorneys for defendant therein.
3. The remark of one of the plaintiffs in his argument to the jury, that he "could point to some other cases where the defendant had captured men's logs and never paid for them," was improper, and should have been rebuked by the court; but the Court are not prepared to hold that it is reversible error.

Error to Muskegon. (Dickerman, J.) Submitted on briefs October 7, 1891. Decided November 13, 1891.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Smith, Nims, Hoyt & Erwin, for appellant.

DeLong & O'Hara, in *pro. per.*

MORSE, J. Plaintiffs sued for professional services in the Muskegon circuit court, and recovered judgment.

The chief controversy upon the trial was the authority of one William Foster, at that time book-keeper of the defendant corporation, to employ the plaintiffs. The defendant requested the circuit judge to direct a verdict

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in its favor, on the ground that there was no competent proof tending to show plaintiffs' employment; that Foster had no power to hire them; and that none of the officers of the defendant having such authority consented to or had knowledge of plaintiffs' employment or services in defendant's behalf.

The services claimed were rendered in a garnishee suit, and were given in justice's, circuit, and Supreme court. Mary Pettit sued William Squiers, an employé of defendant, in justice's court, and garnished the defendant. The garnishee summons was served on Foster, who filed a disclosure for defendant, stating that it was indebted to Squiers in the sum of $13.04 for personal labor. Squiers claimed that he was a householder, within the meaning of the statute, and claimed an exemption of the money due him from defendant. Squiers was defeated in the principal suit. A summons to show cause was issued against the defendant, and served upon Foster. Plaintiffs were the attorneys for Squiers in the principal suit. Plaintiffs also appeared for defendant in the garnishee suit. Mr. O'Hara testified that Foster asked him to do this, and look after the interests of the defendant company. The case was tried, and judgment obtained by the plaintiff, Mrs. Pettit. Plaintiffs in this case then removed the garnishee proceedings by *certiorari* to the circuit court, where the judgment against the defendant was reversed. Mrs. Pettit then sued out a writ of error to the Supreme Court, where the judgment of the circuit court was sustained. *Pettit v. Booming Co.*, 74 Mich. 214.

When the suit was removed from justice's court by *certiorari* the defendant made the usual bond, but Foster took from Squiers and his brother, who was also in defendant's employ, an agreement in writing that the company might keep back their wages then due, and to become due, in a sufficient amount to pay all costs that

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the defendant might suffer by reason of such bond. The bond was signed, "Thos. Monroe, Secretary, per Foster." Mr. O'Hara swears that Foster authorized him to take out the writ of *certiorari*. Before the case was argued in the circuit, the Squiers quit the employment of the defendant, and $38.27 of their wages was retained by the company. At that time Foster served the following notice upon plaintiffs:

"You will please withdraw this suit, as Wm. Squiers and his brother have left our employ and the city.

"Yours truly,

"MUSKEGON BOOMING COMPANY,

"FOSTER."

Mr. O'Hara saw Foster, and told him what the effect of a withdrawal would be, and Foster told him to go ahead. After Mrs. Pettit sued out her writ of error to this Court, Foster told O'Hara to follow it, and, if the defendant prevailed, the company would pay DeLong & O'Hara a good reasonable sum for trying the case in this Court; if Mrs. Pettit won, the plaintiffs were to receive nothing for their services. During the continuance of these proceedings papers in the case were served upon Joseph Davitts, who was in charge of defendant's office, by the attorneys of Mrs. Pettit. Plaintiffs took a printed copy of the record in the Supreme Court to defendant's office, and gave it to Foster, who directed that the briefs be printed at the Muskegon Chronicle office, and, upon plaintiffs approving the bill for printing, the defendant would pay it. It was paid for by defendant, through Foster. After the briefs were printed, O'Hara testifies that he took one of them down to defendant's office. Foster was not there, and he gave it to Mr. Bell, who handed it to Mr. Monroe, the secretary of the company, who was in the office. Mr. Monroe swears that he has no recollection whatever of any occurrence of this kind,

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and that he did not know of any employment of the plaintiffs until they sent in their bill. Mr. O'Hara also testifies that, when the case was likely to be on call in the Supreme Court, he told Foster that they wanted some money to go to Lansing, and Foster gave him $25. Defendant claims that this money was paid out of the wages kept back from the Squiers brothers. O'Hara also says that he talked about the suit with one Tait in the presence and hearing of John W. Blodgett, the president of the company. Mr. Blodgett testifies that he first had notice of the suit in Chicago; that he picked up a Muskegon paper, and saw that the case of *Pettit v. Muskegon Booming Company* was on call in the circuit court of that county. It was his business at that time to retain counsel. On his return to Muskegon within two days he investigated the matter by making inquiries of Foster and Brakeman. After such investigation he did not employ counsel. He was not permitted to state why he did not hire any attorney. In his testimony Blodgett made no reference to O'Hara's evidence as to the talk with Tait in his presence, nor did he testify as to his knowledge of the case being in the Supreme Court.

It appears from the testimony of Mr. Monroe, the secretary of the company, that Mr. Bell, who now occupies the place of Mr. Foster, has charge of the financial matters in the office; that Bell acts as his assistant, and draws orders of the secretary upon the treasurer of the company, and signs Monroe's name to the same; that he takes the secretary's place in his absence, and manages the business for him, except in cases where he is in doubt, when he waits for instructions; that Foster had the same authority as Bell now has, and acted accordingly; that he had a right to act as assistant secretary in certain lines, in the ordinary

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transaction of the company's business. He afterwards defined this to be to—

"Receive the reports as they come in from the heads of the different departments; receipt for logs, and the deliveries of them; make up the weekly statements and averages, and send them to the different owners; receive the pay for the work; pay the men; pay the bills that were audited by the different foremen; and so on."

That he never had any authority to employ counsel or attorneys in any case; that the president and secretary attended to that business; and that he never authorized Foster to employ DeLong & O'Hara in the Pettit case.

The court instructed the jury upon this branch of the case substantially as follows:

"Defendant, Squiers, in the principal suit had the right to defend for the Muskegon Booming Company, and the said booming company would have no right to decline to permit said Squiers, or such attorney as he might select, to appear in said cause.

"The simple appearance of DeLong & O'Hara as attorneys for the booming company in said garnishee case is no evidence of their employment by the defendant.

"Services rendered by the plaintiffs in said garnishee case, without the knowledge of some officer of the defendant, and without their consent, either express or implied, would imply no promise on the part of the defendant to pay for such services.

"If you should be satisfied, from a fair preponderance of the testimony, that Mr. Foster had authority to employ the plaintiffs for and in behalf of the booming company, the defendant, and did employ them, and authorized them to conduct the suit for and in behalf of the booming company, the defendant, why, then, they would be entitled to recover what you may find from the testimony their services were reasonably worth.

"If you should not so find, it would be your duty still to consider the other branch of the case, whether or not the officer or officers of the booming company, the defendant, at that time knew—had knowledge—that the plaintiffs were doing this work, and claiming to do it for

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them as their attorneys, and that is a matter for you to scan very carefully, and for this reason: the illustration made use of by Mr. O'Hara is probably correct, but you should scan the testimony of that branch of the case all the more carefully on this account and for this reason: that Mr. Squiers, the principal defendant in that suit, had a right to use the Muskegon Booming Company's name to test that question of exemption, to conduct that garnishee case in their name, and carry it on as far as he pleased, provided he did it at his own expense, and without any trouble to them. He had a perfect right to, and the mere fact that some officer or officers of the company knew that the suit was pending, and that the suit as pending was in their name or against them, would not be sufficient, because the suit might be pending in their name, and yet they not actually assisting in it, or not have been engaged in it at all. Mr. Squiers would have a right to conduct that suit, and carry it on in their name, and the mere fact that they may have known that such a suit was pending against them, a garnishee suit, would not bind them; nor would they be bound unless they knew that the suit was pending, and these attorneys were conducting it, and also knew that they were conducting it, or claimed to be, as their attorneys, —the booming company's attorneys. If they knew that, or if they had knowledge of such facts as would put them upon inquiry, and if, upon inquiry, they ascertained that this suit was pending, that the plaintiffs were conducting it, and were conducting it as the attorneys of the booming company, and then allowed them to proceed, then they would be estopped from now claiming that they were not acting as their attorneys, although they never may have been employed at all at any time, or may never have been employed by any one authorized to actually employ them. So I say, upon that branch of the case, you should consider all of these elements; because, on account of the nature of this case, and the suit being in its nature double on the start,—first the main suit, and then this garnishee suit ancillary or tacked on to the main suit,—you should consider carefully all these elements related or suggested to you here, before you undertake to pass upon that branch of the case."

We think there was testimony warranting this charge, and sufficient to go to the jury, upon both the questions

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of Foster's authority and the knowledge of the company that plaintiffs were conducting the suit as the attorneys of the company.

But there was error in not permitting Mr. Blodgett to testify why he did not employ counsel in the suit after investigating the matter. As the case stood, it left Mr. Blodgett in the position of knowing that the suit was in progress, and that DeLong & O'Hara had appeared as attorneys of the company; that he knew all this, and yet took no steps to employ other counsel, or to make any protest against DeLong & O'Hara's being in apparent employment of the company. This may have prejudiced the jury, as the fact that Blodgett did not employ counsel to look after the company's interest in the suit, after investigation, is used in this Court as an argument to show that he knew of plaintiffs' employment, and consented to it. It was perhaps so used in the court below. As the reason why he did not employ other counsel would have had a material bearing upon the question of his knowledge and consent to the employment of plaintiffs, or that they were working for the company and not for Squiers, the error was a material one, and the judgment must be reversed, and a new trial granted, with costs of this Court to defendant.

We find no other errors in the record. Mr. O'Hara's remark in his argument to the jury, that he "could point to some other cases where they [meaning defendant] have captured men's logs and never paid for them," was improper, and should have been rebuked by the court; but we are not prepared to say that it was reversible error.

The record in this case is claimed to be unnecessarily long, as it seems to be a complete transcript of the stenographer's minutes. But the main question in the case was the right of the plaintiffs to recover at all upon

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the entire evidence in the case. We think that all the testimony of the extent and value of the plaintiffs' services, except in so far as the amount done had some bearing upon the knowledge of the defendant that they were being performed for the company, might have been safely left out of the record; but, as there is a conflict as to who is responsible for the condition of the record, we shall order no deduction of costs on that account.

The other Justices concurred.

MORRIS BURK v. DAVID H. BURRELL ET AL.

Master and servant—Negligence—Pleading.

The declaration in this case is held to state a cause of action, and to show substantially that at the time the plaintiff was directed to put the belt on the shaft, in doing which the accident occurred, the machinery was in motion, by reason of which, the belt being frayed, plaintiff was caught by the frayed portion of the belt while in motion, and injured; and it is further held that the contention of defendant's counsel that the declaration fails to aver what the regular way was for putting on the belt, and that if plaintiff intended to maintain that such regular way was with the shaft in rapid motion he should so aver distinctly, precisely, and issuably, is not well taken.

Error to Wayne. (Reilly, J.) Submitted on briefs October 15, 1891. Decided November 13, 1891.

Negligence case. Plaintiff brings error. Judgment reversed, with leave to plead. The facts are stated in the opinion.

J. W. Donovan, for appellant.

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Charles M. Swift, for defendants.

LONG, J. This cause was commenced by declaration in the circuit court for the county of Wayne. To this declaration defendants demurred, and plaintiff filed an amended declaration, to which defendants also demurred, and that demurrer was sustained in the court below. Plaintiff brings error. The amended declaration is as follows:

"Morris Burk, plaintiff herein, a resident of said county, by J. W. Donovan, his attorney, complains of above-named defendants, also doing business in said county, of a plea of trespass on the case, filing this amended declaration, and the original hereof, as commencement of suit.

"For that whereas, said plaintiff, while yet a minor (he having only come of age in April, 1890), and while in the employ of said defendants, who were box and wood material makers at Wyandotte, in said county, as a common laborer in and about defendants' works, to wit, about May 11, 1887, while under the direction, management, and control of said defendants as aforesaid, was injured as hereinafter set forth, to wit: At the date and place aforesaid the defendants were box-makers and wood-workers, and in and about which employment defendants' employés were required to use certain swift-running and dangerous machinery, also owned and managed by defendants, to wit, wheels, belts, and pulleys, knives and shafts, all run by steam-power, and to manage which it became and was the duty of said defendants to use care, caution, and strong, safe, and sound machinery, in and about its manufacturing of box material, staves, timbers, and divers kinds of wood-work, as aforesaid, and to keep the same in safe condition; yet said defendants, well knowing the premises, and carelessly neglecting to provide said works (in which plaintiff was set to work by defendants, their servants and agents) with the usual safe wheels, belts, pulleys, shafting, and sound machinery, did, to wit, on the day aforesaid, carelessly neglect, allow, and permit a portion of their said belting, to wit, one of the main belts in the shop where plaintiff was employed, to

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become worn, weak, broken, frayed out, unsafe, and dangerous to this plaintiff, and to all other persons in their said employ, and the workmen in and about said factory.

"And plaintiff avers that, while in his regular employ as laborer and helper in said works, he was sent and directed by the foreman of said works to put a belt on one of the shafts aforesaid, in the regular way, and did carefully proceed and attempt to adjust said belt as usual, and which, if sound, could be put on with ease and safety, not knowing its weak, half broken, and dangerous condition, when a loose strip of said belt suddenly caught and entangled the plaintiff's left arm, drawing it violently over the wheel and shaft, and breaking the wrist, fore-arm, and arm and fingers of plaintiff, without any fault of his own, and by and through the carelessness of said defendants in permitting the use of said unsafe, frayed out, and dangerous belt, which the defendants well knew to be unsafe, unsound, and dangerous; whereby this plaintiff, on the day aforesaid, while in said employ, and in the due discharge of his duty (in working around said machinery), and without any carelessness on his part, and while exercising due and proper care, was caught and mangled by said broken and unsafe belt connected with said machinery, which so entangled his arm as to draw him violently over the wheel of defendants' works, while in swift motion, instantly wrenching and twisting and crushing plaintiff's left wrist, fore-arm, and arm, hand, and fingers, causing plaintiff great sickness and bodily disorder therefrom, for about one year thence next following; and also causing said arm to be shorter by an inch than the plaintiff's other arm, and greatly deforming said left arm, hand, and fingers of plaintiff, and permanently disabling and injuring this plaintiff from earning his usual wages, to wit, about $10 a week, for one year, and from earning full wages ever since said date, to his loss and damages in wages $1,000, and fully $200 for board and nursing, and from which injuries plaintiff had never fully recovered, and is permanently injured, all without fault of plaintiff, and wholly by and through the carelessness and negligence of defendants in failing to keep, provide, and use safe, sound, whole, and reliable belts and machinery as aforesaid, especially after having been warned of the ragged, torn, broken, and unsafe condition of the belt aforesaid, which defective belt broke and injured plaintiff in the manner aforesaid, to his damage

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$10,000, whereby an action hath accrued to plaintiff as aforesaid, and therefore he brings suit, etc."

It is contended on the part of defendants that the difficulty with plaintiff's amended declaration is that it avers that the plaintiff was directed by defendants' agent to put the belt on the shaft in the regular way, but does not aver what the regular way was; that the regular way, according to common experience, would be with the shaft thrown out of gear, and the wheel stationary, in which case it is impossible to understand how the accident to the plaintiff could have occurred; that, if the plaintiff intends to maintain that the regular way was with the shaft in rapid motion, he should so aver, distinctly, precisely, and issuably, for on this point defendants desire to take issue, and they are entitled to be informed before trial whether or not proof will be required; that two demurrers and an oral argument have challenged the attention of plaintiff's counsel to the particular matter in respect of which defendants insist upon precise information, but he refuses to amend, and maintains the sufficiency of his declaration; and that it should therefore be judged according to strict rules.

This point is not well taken. The declaration does show substantially that, at the time the plaintiff was directed to put the belt on, the machinery was in motion, and by reason of which, the belt being frayed, the plaintiff was caught by the frayed portion of the belt while in motion, and injured. It may or may not have been the usual way to put the belt on while the machinery was in motion, yet the declaration alleges that the plaintiff was directed to put the belt on at that time, and at the time he was so directed the machinery was in motion. We think the declaration states a cause of action, and the court below was in error in sustaining the demurrer.

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The judgment will be reversed, with costs, and a new trial ordered. Defendants will have 20 days after case is remanded to plead.

The other Justices concurred.

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HEZEKIAH HEMPHILL ET AL. v. LOUISA HOLFORD AND ANDREW D. HOLFORD.

Mental incompetency—Undue influence—Evidence—Laches.

1. Where, in a case involving the mental competency of a grantor, plenty of witnesses are found to testify upon both sides of the controversy, and the opinions seem evenly balanced, courts will look to the circumstances surrounding the transaction, its fairness, the history and character of the grantor, and the probability that one in the possession of his faculties would make a transfer of his property in a given case.
2. Where, in such a case, the relation between the grantor and grantee is very largely in the nature of guardian and ward, and in view of the grantor's condition it becomes the grantee's duty to properly care for him and his property, it is the duty of the grantee to show entirely clean hands in the transaction.
3. Delay by children in instituting proceedings to test the mental competency of an aged father to execute a deed until after his death is not such laches as will bar their right to file a bill to set aside the deed after his death.

Appeal from Genesee. (Gage, J., presiding.) Argued October 9, 1891. Decided November 13, 1891.

Bill to set aside a deed because of mental incompetency and undue influence. Complainants appeal. Decree reversed, and one entered in this Court as prayed. The facts are stated in the opinion.

Frank B. Leland, for complainants.

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Howard & Gold, for defendants:

1. As to what amounts to undue influence, counsel cited *Maynard v. Vinton,* 59 Mich. 139; *Schofield v. Walker,* 58 Id. 96; *Potter's Appeal,* 58 Id. 106; *Pierce v. Pierce,* 38 Id. 412.

GRANT, J. The complainants in this case are the heirs at law of Ovid Hemphill, deceased, and instituted this suit to set aside a deed executed by him to defendant Louisa Holford June 10, 1875. The reasons alleged are mental incompetency of the grantor, and undue influence exercised over him by the defendants.

Ovid Hemphill was born in the year 1799, came at an early day to the township of Burton, Genesee county, and purchased the land, 160 acres, which forms the controversy in this suit. He cleared and cultivated this farm during his active life, and at the time he gave this deed it was worth from $7,000 to $8,000. He was a man of unusual physical and mental activity. He took great interest in public affairs, and was several times elected to offices of local importance and trust. He had raised a large family, and by his work and energy, aided by his family, had become the owner of property of considerable value. He was a man of strong convictions, and up to about the year 1867 took great interest and pleasure in the management and control of his own affairs. At that time his health became poor, his shoulder was dislocated in a fall, and he had a stroke of paralysis, from which he never recovered. All the physicians in the case testified, and it is common experience, that under this disease both the physical and mental faculties gradually grow weaker. About this time he gave up the entire control and management of his property, and made a conveyance of it all to one Jackson, his son-in-law. While the record leaves us much in doubt as to the circumstances surrounding the making of this deed, and the inducements for it, yet it is fair to infer that it

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was made without consultation with his children, and without sufficient consideration. A friend of the family, knowing of this deed, notified one of Mr. Hemphill's children. Upon their protest he destroyed the deed. Soon after that he made a lease of his farm to his son Hezekiah and defendant Andrew D. Holford. This lease was a practical disposal of all his property during his life. The lease ran for five years, and, if he should live longer, then it was to run during the term of his natural life, if the lessees so elected. Mr. Hemphill reserved the right to sell the premises by paying to the lessees a fair and reasonable compensation for their labor and improvements and their interest in the lease. The stock upon the farm belonging to Mr. Hemphill was to be used by and for the benefit of the lessees, with one-half the increase to lessor the first year, and after that the entire increase to lessees.

It thus appears that at the age of about 68 years Mr. Hemphill virtually closed his busy and active life, and turned over the management of all his property to others. In return for this these lessees agreed to furnish suitable maintenance and medical care for Mr. Hemphill, his wife, and an incompetent son. At the end of five years Hezekiah assigned his interest in this lease to Mr. Holford. Mr. Holford continued to carry on the place under the terms of this lease until the deed in question was made. The income from the farm was ample compensation to the lessees for the consideration paid. After Hezekiah left, Mr. Ovid Hemphill and all his property were under the sole charge and control of the defendants. About a year after Hezekiah left, Mr. Hemphill made a will devising his property to his wife during her life, and making defendant Louisa the residuary legatee. Two neighbors were called in to attend to the drawing and execution of this will. A messenger

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was sent for them from the house of the defendants. The witnesses came, and, after talking over the matter with Mr. Hemphill in the presence of the defendants, they retired to the house of Mr. Atherton, the witness who drew the will, and there discussed the competency of Mr. Hemphill to make a will. This was in 1873, and during that year Mr. Hemphill's wife died. His incompetent son had also died. In the year 1875 this deed was executed. These four transactions are the only ones in which we find this once strong, vigorous, and busy man engaged from 1867, when he was 68 years old, down to the time of his death; and two of these—the first and last—conveyed away the whole of his earthly possessions without any sufficient consideration. The last deed was an absolute conveyance, without any consideration expressed in the deed, except the nominal sum of $100, and without any written provision whatever for his care and maintenance.

Mr. Hemphill had had no difficulty with any of his children, and no reason appears on this record why he should have given all his property to one. He was under no more obligations to her or to her husband than to his other children. The use of the property remunerated defendants most abundantly for all they did.

The above are the conceded facts in this case, in the light of which we must consider the testimony of the witnesses,—on the one side to his competency, and on the other to his incompetency. Nineteen witnesses were sworn by the complainants, and 23 by the defendants, upon this question. As has been frequently stated by this Court, it is unprofitable, unnecessary, and of no importance in these cases to give the evidence in detail. Two physicians testified upon each side. The other evidence came from members of the family, and, of course, deeply interested, and from neighbors who had

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known Mr. Hemphill for many years, and from others who worked upon the farm for the Holfords about the time the deed was executed. These last witnesses testified to his incompetency. As is usual in these cases, plenty of witnesses are found to testify on both sides of the controversy. When this is the case, and opinions seem evenly balanced, courts will look to the circumstances surrounding the transaction, the history and character of the man, the fairness of the transaction, and the probabilities that one in the possession of his faculties would make a transfer of his property in a given case.

I cannot concur in the opinion of the learned circuit judge that the evidence on the part of the defendants makes a stronger case of competency than does the evidence on the part of the complainants of incompetency. Those who worked upon the place about the time the deed was made, and who saw most of Mr. Hemphill at that time, judged him to be incompetent. Another important fact is that during that time his competency was the subject of conversation among his children, and doubts were expressed in regard to it. Witnesses who are unimpeached on this record testified to statements made by both the defendants of his incompetency. It may be conceded that the evidence of these witnesses alone might lead fair minds to different conclusions, but when we consider the unnaturalness, the inequity, and injustice of the transaction, I think the fair preponderance of evidence is on the side of the complainants.

It is manifest that long before the execution of this deed this old man had become enfeebled in body and mind. A man of his character, habits, and vigor does not readily give up the management of his business affairs, and, still less, give away his property, rendering himself little less than a pauper. Such conduct is contrary to

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common experience. It is unnatural that such a man as was Mr. Hemphill should, when in possession of his faculties, and in the knowledge that but few years of life were left him, transfer this large property to one child, and thus disinherit all his other children, and the children of a deceased daughter.

The relation between these defendants and Mr. Hemphill was very largely in the nature of guardian and ward. In his condition it became their duty to properly take care of both him and his property. Under the record in this case I think it was their duty to show entirely clean hands in this transaction. It was right that they should be amply compensated for the care taken, and they were so compensated by the use of the property. The deed was nothing more nor less than an absolute gift. They knew that this was inequitable and unjust, and it is manifest that they not only made no objection, but that they actively assisted in its accomplishment.

It is insisted that the complainants are guilty of laches, in that they waited until after the death of Mr. Hemphill before taking steps to set aside the deed. It is insisted with much vigor by defendants' counsel that defendants were entitled to have had his competency adjudicated by a direct proceeding in the probate court, when Mr. Hemphill could have been produced for examination. I do not think this such laches as should bar the complainants' remedy now. Children might well hesitate to drag an aged parent into court under such circumstances. If they prefer, they have the right to wait till the death of the parent, and then file their bill.

The decree of the court below is reversed, and decree will be entered in this Court in accordance with the prayer of the bill, with the costs of both courts.

CHAMPLIN, C. J., MORSE and MCGRATH, JJ., concurred. LONG, J., did not sit.

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SAMUEL J. KELSO v. FREMONT WOODRUFF.

Factors and brokers—Right to commission on sale of real estate—Practice in circuit court—Directing verdict.

1. A defendant who has not rested his case cannot except to the refusal of the court to direct a verdict in his favor; citing *Clow v. Plummer*, 85 Mich. 550, and cases cited.
2. The question whether plaintiff was the procuring cause of the sale on account of which he seeks to recover a commission of $100, which he claims the defendant agreed to pay him if he found a purchaser, is held to have been, under the evidence, a question of fact for the jury.

Error to Wayne. (Gartner, J.) Argued October 27, 1891. Decided November 13, 1891.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Chamberlain & Guise, for appellant, contended:

1. An agent, in order to recover commissions on the sale of real estate, must show that he procured a purchaser, and from him an unqualified acceptance of the offer of sale; citing *Hannan v. Fisher*, 82 Mich. 208; *Ellsmore v. Gamble*, 62 Id. 543; *Sibbald v. Iron Co.*, 83 N. Y. 378; and it is a part of the risk he assumes that, failing himself, others may be left to some extent to avail themselves of the fruit of his labors; citing *Wylie v. Bank*, 61 N. Y. 416; *Warren v. Powder Co.*, 9 N. Y. Supp. 842; *Powell v. Lamb*, 1 Id. 431; *Chandler v. Sutton*, 5 Daly, 112; *Bennett v. Kidder*, Id. 512; *Dennis v. Charlick*, 6 Hun, 21; *Schwartze v. Yearly*, 31 Md. 270; *Vreeland v. Vetterlein*, 33 N. J. Law, 247; *Lane v. Albright*, 49 Ind. 275; *Lloyd v. Matthews*, 51 N. Y. 132.

Charles Flowers, for plaintiff.

MORSE, J. The plaintiff sued defendant for $100, and obtained judgment in justice's and circuit court.

His claim is based upon the following facts: William

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H. Stevens had the apparent title to certain property in the city of Detroit, which he obtained by sale under a chattel mortgage given him by Baker & Shefferly. The property consisted of machinery and fixtures used in a sash, door, and blind factory and planing mill. Stevens took possession of it, putting the defendant in charge. Plaintiff was employed as a book-keeper for Stevens. At the time the contract was made between plaintiff and defendant, the indebtedness from Baker & Shefferly to Stevens had been reduced to $2,300. The plaintiff testifies that defendant had been advertising the property for sale, but with no success. Plaintiff said to him that he thought he could find a purchaser. Defendant said, "Well, go ahead." Plaintiff replied: "Mr. Woodruff, of course I cannot do such a thing as this on my salary for working in the office. I shall charge you something extra for that." Defendant said, "How much will you charge?" Plaintiff answered, "$100;" to which defendant replied, "That is all right; you get me a purchaser, and I will pay you $100." No price was agreed upon at which the property should be sold. Plaintiff swears that this agreement was made with defendant personally, and not with him as the agent of Stevens, and that he supposed defendant was interested in closing the matter up so as to get his fees; defendant being an attorney at law, and having foreclosed the mortgage. Defendant also told him that he wanted to have the property sold to get his pay out of the matter. Plaintiff then made efforts to get a purchaser, and finally went to Essex Center, in Canada, about 20 miles from Detroit, and induced one Lang, of Lang Bros., to come up and look at the property, and then turned him over for negotiations with the defendant. Defendant asked $5,000 cash, and Lang said "that was enough," and went away, declining to purchase at that price. Afterwards plaintiff

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learned that Lang Bros. had purchased the property, paying $2,700 for it. He then demanded the $100 of defendant, who refused to pay it.

Plaintiff put Lang upon the stand as a witness, who, upon cross-examination, testified that when defendant asked him $5,000 cash for the property he dropped the matter from that moment, and gave up all idea of purchasing it. He finally became the purchaser in this way: Mr. Eastwood, of Bay City, came down to see him some time in July. (It was in the fore part of June when he looked at the property on plaintiff's solicitation.) Eastwood wanted Lang to make an offer for the property, and said that he had the business with one Smith. Lang went up again, and looked the property over, and made an offer, which was not considered, and returned home. Eastwood came down to see him again, and finally accepted his offer, which was made by Lang for himself and brother. They purchased the property for $2,700, and paid the same to Stevens. He also testified that plaintiff had nothing to do with effecting this sale; that it was done entirely through Eastwood and Smith. The purchase price was paid, $700 in money, and the balance by notes, and chattel mortgage as collateral security to the notes. The Lang Bros. supposed they were buying of Eastwood and Smith, but received their title from Stevens, and paid him for the property.

Upon the close of plaintiff's and Lang's testimony, the defendant asked the court to direct the jury to render a verdict in his favor, which request the court refused. This is assigned as error, but, as the defendant went on and introduced testimony in his own behalf, he must be considered as having waived his exception to this refusal. Not having rested his case when he made his request, he cannot except to the ruling. See *Morley v. Insurance Co.*,

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85 Mich. 210; *Clow v. Plummer*, Id. 550; *Denman v. Johnston*, Id. 387; *Hinchman v. Weeks*, Id. 535.

The defendant then introduced testimony tending to show that the contract with plaintiff was to pay him $100 if he found a purchaser of the property at the price of $5,000 in cash; that Lang came to see the property at plaintiff's solicitation, but refused to buy; that after that defendant never saw Lang again, and never heard anything from either of the Lang Bros. until they were in the possession of the property; that defendant left Detroit on the 30th of June, and did not return until Lang Bros. had purchased; that it was understood that, if Stevens sold the property for more than his debt, the balance was to go to Baker & Shefferly to pay the claims of the other creditors; that Baker & Shefferly were owing Smith $800 and upwards, and he, in connection with Eastwood, procured an option from Stevens on the property for $2,300, and Eastwood went to Essex Center, and procured Lang Bros. to buy the property at $2,700; that Smith and Eastwood supposed the payment would be made in cash, and they would get $400 out of it; that when they found that part of it was to be paid by secured notes, the whole payment was made to Stevens, and they received an agreement from Stevens to pay them the $400, but it has not been paid as yet.

The defendant contends that, upon the whole case, plaintiff could not recover, and that the jury should have been so instructed. The plaintiff claims that he fulfilled his part of the agreement; that he was the "moving cause" of the purchase by Lang Bros.; that the purchase would have been consummated in the first place had defendant not placed an exorbitant price upon the property, and demanded cash payment in full; and that the after-purchase was due to his efforts in the first

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place. His counsel argues that the intervention of Smith and Eastwood was a scheme to deprive him of the $100, and that they would never have obtained Lang Bros. as purchasers, except through the knowledge that they gained from his hunting out and bringing Lang Bros. to look at the property with the view of purchasing it.

We think the plaintiff had a right to go to the jury upon the whole case, and that the circuit judge did not err in his instructions. The jury were clearly informed by the court that they could not find for the plaintiff if they found the defendant's version of the contract to be true; and, if they found the agreement as claimed by plaintiff, they must further find that the agreement was made with defendant personally, and that he meant to bind himself personally, and that plaintiff was the "procuring and efficient cause of the sale," in order to bring in a verdict for the plaintiff. The defendant did not claim in his testimony that he made the contract as the agent of Stevens, and his evidence was open to the interpretation that he made it on his own account. The question whether plaintiff was the procuring cause of the sale, under the evidence, was one of fact, and not of law.

We do not think the jury were misled by the reference of the court to Stevens' liability, because the circuit judge, at the close of his charge, said:

"I have referred to the liability of Mr. Stevens under certain circumstances, but, as far as that is concerned, it does not cut any particular figure in the case. Mr. Stevens may be liable under the circumstances, but he is not the defendant in this case. The question, and the only question, for you to determine will be as to the liability of Mr. Woodruff. If he is liable under the circumstances as I have stated them, your verdict will be for the plaintiff; otherwise it will be for the defendant."

Judgment is affirmed, with costs.

McGRATH and LONG, JJ., concurred. CHAMPLIN, C. J., and GRANT, J., did not sit.

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DANIEL W. SNODY v. CORNAIL SHIER.

Sale—Warranty—Waiver—Rescission—Findings of fact.

1. The findings of fact of the trial judge will not be disturbed where the testimony in the record tends to support the facts found.
2. The conduct of plaintiff's agent in insisting that the harvesting machine purchased by the defendant should be kept over harvest for further trials, which resulted in the failure of the machine, is held to constitute a waiver of a provision in the warranty accompanying the machine that keeping it during harvest, whether kept in use or not, without giving notice to plaintiff of the defects complained of as provided in the warranty, should be conclusive evidence that the machine filled the warranty.

Case made from Huron. (Beach, J.) Argued October 30, 1891. Decided November 13, 1891.

Assumpsit. Plaintiff assigns error. Affirmed. The facts are stated in the opinion.

McGinley & Durning, for appellant.

Horace G. Snover (*E. F. Bacon,* of counsel), for defendant.

LONG, J. This action was tried in the circuit court for the county of Huron without a jury, and the court found the following facts and conclusions of law:

"1. That on or about the 1st day of June, 1887, the defendant proposed to purchase of the plaintiff's agent at Ubly, in said county, a Meadow Lark mower for $50 cash, or $55 on time. The mower was not in stock at the time, and defendant was permitted to take an old mower until the new one could be delivered. A printed form of warranty was furnished to the defendant when he made his order, as follows:

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"'Remove this warranty, and give the purchaser warranty.

"'————————, 188—.

"'The ———— is warranted to cut, if properly managed, one acre per hour, or ten or twelve acres of grass or grain per day, in a workman-like manner, and to be light draught for two horses.

"'The farmer agrees, on accepting and before starting this machine, to follow the directions given him by the agent; to put same together, and give it a fair (reasonable) trial; and is allowed to cut five acres of his grass and five acres of his grain on trial. If he cannot make it perform according to the above warranty, he shall give to the manufacturer (by his agent or otherwise) immediate notice thereof, who shall have time to send a man to put it in order, and the privilege of readjusting the machine, and giving it further trial (for which the farmer shall furnish a suitable team and grass and grain to cut), and have time to replace the defective parts.

"'If the machine is at fault, and does not perform according to the above warranty, the farmer will lay it aside, store it safely under cover, and redeliver it, when called for by the agent, at the place (depot or warehouse) where received.

"'As our agents have agreed not to sell our machines on any other terms, all verbal contracts must conform to the above warranty and conditions.

"'The manufacturers further agree to supply, free of invoice, all defective parts which may be developed during the first season's use, excepting knife sections and sound parts broken by accident or carelessness.

"'Keeping the machine during harvest, whether kept in use or not, without giving notice as above, will be deemed conclusive evidence that the machine fills the warranty.

"'It is also warranted to be well made of good material, and, when properly used, not liable to get out of order.

"'Keep knives sharp, and bearings and journals well oiled with lard oil.'

"2. Before the new mower was delivered, defendant concluded he would change his order to an order for a combined machine, reaper and mower, and did so; and was informed by the agent that he could have the combined machine for $20 more than the other machine, and upon the same terms as his order for the mower.

"3. The combined machine was delivered, and, when received, the attention of the agent was called to a crack in what the witness terms the 'cap,' and defendant was informed that if it gave out a new one would

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be supplied. It did give out on the first trial, and a new one was put on; but the machine did not work satisfactorily, and plaintiff's agent was so informed. Defendant finished his grass and grain by hand, and the machine was stored in the barn under the agent's directions, who stated that before next season some one would be there to fix it.

"4. The next season, before harvest, the plaintiff, in person, went to defendant's barn, and made some repairs on the machine, and it apparently worked all right on the barn floor, and defendant attempted to work with it in the field, but it did not work; and plaintiff's agent was notified, and something more in the way of repairing was done by the agent, and defendant requested to try it again. Defendant assured plaintiff's agent that he did not believe it would work; that he intended to put his own team on it; and that with that team, if the defective parts of the machine acted as they had before, the machine would be stripped or injured. He was told to try it, did so, and after a short time it again failed, and the cogs on some of the wheels were stripped, and no more work was done with it, or could be done with it, and plaintiff's agent was informed of the facts. Afterwards, and about the time suit was brought, and after defendant heard that suit was to be brought on, he returned machine to the warehouse, but did not inform plaintiff's agent of the return, and suit was brought; but plaintiff's agent knew of the return before suit was brought.

"CONCLUSIONS OF LAW.

"I find, as a matter of law, that as machine was kept by defendant, at the request of plaintiff's agent, after notice of defect, for further trials from time to time, such action of plaintiff's agent was a waiver of the clause in warranty in relation to keeping the machine over harvest, and such repeated trials upon request and final failure gave the defendant the right to rescind under the third clause of the warranty; and that under all the dealings of the defendant with the plaintiff's agent and the plaintiff himself the sale was rescinded.

"Defendant is entitled to judgment of no cause of action, with costs to be taxed, including fifteen dollars attorney fee."

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The case comes to this Court upon case made. Several errors are claimed in the rulings of the court below, but the only questions discussed here are—

1. Whether the evidence supports the finding of facts.
2. Whether the facts found support the conclusions of law.

We need not enter upon a discussion of the testimony. It is all returned in the record, and we are satisfied that there is testimony upon which the court might find the facts returned. Defendant's testimony was largely contradicted by the plaintiff's witnesses, but we cannot disturb the findings of the court below, where there is testimony tending to support the facts found.

The trial court found, as matter of law, that the conduct of the plaintiff's agent in insisting that the machine should be kept over harvest, and further trials made, and such trials resulting in the failure of the machine, constituted a waiver of the clause in the warranty, by the terms of which a return was to be made before the harvesting season was over if the machine was defective; and that the circumstances were such that defendant had the right to rescind the sale, and did rescind it, before this suit was brought.

The facts found by the trial court warrant this conclusion. From the findings, it appears that defendant gave the machine a fair trial from the outset, gave the plaintiff's agent notice of the defects and an opportunity to remedy them, but the defects were not remedied. Under the direction of the plaintiff's agent, the machine was put in the barn of the defendant, and kept until the commencement of the next season, when again, at request of plaintiff's agent, defendant attempted to use it, but still found it defective. The plaintiff, being notified, again attempted to remedy the defects, and upon his failure to do so defendant insisted upon his right to

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rescind the contract, and did rescind it. Under the facts found, the conclusions of law reached by the trial court were correct.

The judgment must be affirmed, with costs.

The other Justices concurred.

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BRIDGET CLARK v. THE VILLAGE OF NORTH MUSKEGON.

[See 86 Mich. 29.]

Municipal corporations—Defective highway—Pleading.

1. In a negligence case brought under Act No. 264, Laws of 1887 (3 How. Stat. §§ 1446*c*—1446*h*), against a municipal corporation for failing to keep a highway in repair, the declaration must aver:
   a—That the highway within which the accident happened was open to public travel.
   b—That it had been in use as a public highway for 10 years; citing *McKeller v. Township of Monitor*, 78 Mich. 485, 491.
   c—But it need not refer expressly to the statute.
2. An objection that a declaration in a negligence case fails to refer to the statute, by virtue of which alone the right of action exists, cannot be raised upon the trial under the plea of the general issue; citing *Fuller v. Mayor*, 82 Mich. 480.
3. A declaration which describes the defendant as "the village of North Muskegon, a municipal corporation of the State of Michigan," sufficiently alleges its corporate existence.

Error to Muskegon. (Dickerman, J.) Argued October 30, 1891. Decided November 13, 1891.

Negligence case. Plaintiff brings error. Order sustaining demurrer affirmed, and case remanded, with leave to amend declaration. The facts are stated in the opinion.

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Turner, Turner & Turner, for appellant.

Arthur Jones (*Joseph H. Clark,* of counsel), for defendant.

GRANT, J. Plaintiff brings suit to recover for injuries which she claims to have sustained by reason of a defective sidewalk. Defendant interposed a demurrer, which was sustained, and plaintiff appeals.

1. The declaration describes the defendant as "the village of North Muskegon, a municipal corporation of the State of Michigan." It is insisted that this is no averment that the defendant is a township, village, or city corporation. I think it is a sufficient allegation of its corporate existence and character. The plain inference is that it is a village corporation, duly organized.

2. The declaration does not allege that the street within which the accident happened was open to public travel. Unless so open, no liability attaches. Act No. 264, Laws of 1887, § 3. It is not sufficient under this statute that it be a public highway or street, but it must be opened to the public for use. Inasmuch as there is no liability aside from the statute, the pleader must allege the necessary averments to bring himself within it. Upon demurrer, this objection is good.

3. The place of the accident is described as being upon the south side of Maple street, in front of the premises owned by one E. C. Misner. While the description might be more specific, still I think this was sufficient.

4. The declaration contains no averment that this street had been a public street or highway for the period of 10 years and upwards. See section 4 of the above act. Under this section no redress is afforded unless the highway has been in use as a public highway for 10 years. *McKeeler v. Township of Monitor,* 78 Mich. 485.

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Plaintiff concedes that upon the trial it would be incumbent upon her to prove the existence of such a highway. It was therefore necessary for her to allege it. This is not an exception which need not be averred, within the rule laid down in *Myers v. Carr*, 12 Mich. 63. It is not a defense which the defendant must make. Unless the plaintiff established this fact, she would not be entitled to recover.

5. No reference is made in the declaration to this statute, by virtue of which alone the right of action exists, and it is insisted that upon demurrer this objection is good. It could not be raised upon the trial under the plea of general issue. *Grand Rapids & I. R. R. Co. v. Southwick*, 30 Mich. 446; *Fuller v. Mayor*, 82 Id. 480. In these cases the facts alleged in the declarations were sufficient to establish a liability under this statute, without which there would be no remedy. But we see no reason for requiring the pleader to expressly refer to the statute. He must make a case bringing the defendant within the liability created by the statute. When this is done the defendant cannot be misled, nor can any doubt exist but that the declaration is framed under the statute.

Judgment is affirmed, with costs, and the case remanded to the court below, with permission to the plaintiff to amend upon payment of costs.

The other Justices concurred.

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HARRY L. SHAW v. RICHARD ARMSTRONG.

Contract—Action—Quantum meruit—Evidence.

1. Where suit is brought to recover for labor performed under an express contract, and the parties differ only as to the price agreed to be paid, the plaintiff cannot abandon the contract, and recover what the labor was reasonably worth.
2. Where, in such a case, the plaintiff is informed by the defendant, on making the first monthly payment, that he claims that the labor is to be performed at a less price than that claimed by the plaintiff, plaintiff cannot go on with the performance of the work on the theory that there is no contract, and that he is entitled to recover its reasonable worth.

Error to Saginaw. (Edget, J.) Submitted on briefs November 6, 1891. Decided November 13, 1891.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Lawson C. Holden, for appellant, cited no authorities.

George W. Weadock (*T. E. Tarsney,* of counsel), for plaintiff, cited no authorities.

MORSE, J. The controversy in this case involves the sum of $200.

The plaintiff sues in *assumpsit* upon the common counts, and filed his bill of particulars, the item of such bill in dispute being as follows:

"1888, Nov. 1. To six months' service of two steam fire-tugs, E. Haight and C. P. Fish, *as per agreement,* $500."

The plaintiff testified that after some negotiations as to this labor, before the service was performed, with the defendant, in which they did not agree as to the price,

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the defendant offering $300 and plaintiff asking $500, the defendant said to him in substance that whatever bargain he could make with defendant's son, William Armstrong, would be all right; that he then entered into negotiations with the son, who finally told him to go ahead, and do the work at $500. At the end of the first month, when he came to draw his pay, William offered him a check for $50, which would be at the rate of $300 for the whole work. At first plaintiff refused to take this sum, and said: "That ain't right; $500 would be about $83 and some odd cents." William told him that if he did not take that he would get nothing. Plaintiff finally took the $50, giving a receipt for that amount "on account." He received $50 a month for four months thereafter, giving the same kind of a receipt each time; making $250 in all. The balance to make up the $300 was tendered him upon the trial. After the first payment the plaintiff well understood that defendant claimed that he was to pay but $300 for the work. The defendant and his son, William, testified that plaintiff agreed to do the work for $50 per month. There was other testimony tending to corroborate the claims of both parties. The plaintiff had judgment in the circuit court.

The court erred in permitting the plaintiff to testify that defendant's son, William, told him that his father was getting $4,000 for doing the fire-tug service on the Saginaw river for that year, and to follow it up by stating that the work the defendant wanted him to do was fully two-thirds of such fire-tug service. It was not material to the issue what defendant received, or what share of defendant's job he wanted plaintiff to do. It is contended that the plaintiff was entitled to this as a part of the talk and negotiations of the parties while they were engaged in making the contract between them; but the evident effect of it was to prejudice the jury,

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and to influence them to give the plaintiff his claim, as $500 would be but one-eighth of what defendant received, while plaintiff did two-thirds of the work. After plaintiff had detailed the talk leading up to the agreement, without mentioning this statement, his counsel asked him this question:

"State whether or not he informed you how much he was getting for the entire service."

The question was objected to, and ruled out by the court. Thereupon plaintiff's counsel said:

"I offer, if your honor please, to show that in this conversation Mr. William Armstrong stated to Mr. Shaw that he was to get $4,000 for doing the fire-tug service on the Saginaw river for the year 1888, commencing with May 1, and ending with November 1; and that Mr. Harry Shaw said to him that he would not accept a position for $50 a month, by which he was to perform half the service, for which Armstrong was to get $4,000 for $300. It is part of the negotiations in this case."

Under this offer the testimony was admitted.

The effect of this evidence will be seen when we consider another error in the admission of testimony and the charge of the court. The plaintiff was permitted to show what his services were worth, under the theory that, if the jury found that the minds of the parties did not meet, the plaintiff was entitled to recover what his work was worth, not exceeding $500. And the court instructed the jury in substance that, if the minds of the parties did not meet,—that one understood that the price was to be $500 and the other $300,—both acting in good faith, the case was one where services were performed in the absence of a contract, and the law would give the plaintiff what his work was reasonably worth, not exceeding $500. If this were correct, the fact that the defendant was receiving $4,000 for the entire job, and the plaintiff

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was performing two-thirds of it, would have an important bearing upon the value of his services.

But this admission of testimony and the charge of the court were erroneous for three reasons:

1. The bill of particulars limited the cause of action to an agreement to pay $500.

2. The plaintiff claimed a positive agreement on the part of the defendant to pay him $500, and the defendant an equally positive agreement that the work should be done for $300. There was no mistake about it. One or the other, in his testimony, told the truth; and the only issue was which one. There was no room in the case for the theory that the minds of the parties did not meet, and that one honestly thought the contract price was $500, and the other that it was $300. A case precisely in point is *Alderton v. Wright*, 81 Mich. 294.

3. After the first month's work was performed, the plaintiff knew that the defendant claimed that the work was to be done for $300. He could not go on with the work thereafter upon the theory that there was no contract, and that he was entitled to pay for what his work was worth. After that he was bound to establish the contract at $500, or to take defendant's price, $300. He had distinct notice that the defendant was permitting the work to be done under the idea or claim that there was a contract at $300. Under such notice he could not recover more than $300, unless he proved a contract for a higher price.

The judgment must be reversed, and a new trial granted, with costs of this Court to defendant.

The other Justices concurred.

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HENRY GAMBLE v. WILLIAM ROSS ET AL., AND HIRAM W. SIBLEY AND ISAAC BEARINGER v. WILLIAM ROSS ET AL.

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[Two cases.]

Land contract—Right of possession—Mortgage—Removal of timber—Waiver of security.

1. An executory land contract has no tendency to show any legal title in the vendee, or in any person claiming under him; and, if it conveys no legal possessory interest in or upon the land, it does not give the vendee a legal right to its possession; citing *Buell v. Irwin*, 24 Mich. 145.
2. Where the vendee in a land contract assigned it to third parties as collateral security for the performance of a contract with them, and to secure them for money advanced to pay the balance of the purchase price of the land, and in the assignment authorized the vendor to convey the land to the assignees, the papers will be construed together, and the deed treated as a mortgage; citing *Enos v. Sutherland*, 11 Mich. 538; *Ferris v. Wilcox*, 51 Id. 105; *Jeffery v. Hursh*, 58 Id. 246.
3. The mere fact that, prior to the performance of said conditions, the assignees allowed the vendee to lumber the land so conveyed to them with other lands owned by them will not be a waiver of their rights under the deed, contract, and assignment.
4. Where in replevin by the vendee from the assignees, of lumber manufactured from logs taken from their lands and from the lands conveyed to them, the assignees claim to have made advances upon the logs cut from the latter lands, and to have received an order from the vendee turning over to them the lumber manufactured from said logs, which claims are denied by the vendee, who claims to have acted in his own right, it is for the jury to pass upon such disputed questions of fact.
5. In case such issue is found in favor of the vendee, and it is further found that he lumbered the latter lands on his own account, being in possession of the same, all with the knowledge and consent of the assignees, the jury might be justified in finding that their lien under their mortgage was waived, and that they looked personally to the vendee, and not to such security.

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Error to Wayne. (Hosmer, J.) Argued October 16, 1891. Decided November 13, 1891.

Replevin. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

George W. Weadock (*T. E. Tarsney*, of counsel), for appellants, contended:

1. Permitting Gamble to cut the lumber from the Webber land was a waiver of defendants' right upon it as security, and constituted a license to cut, which, by reason of its exercise, vested the title and ownership of the lumber in question in Gamble; citing *Greeley v. Stilson*, 27 Mich. 157; *Haskell v. Ayres*, 35 Id. 89; *Wetmore v. Neuberger*, 44 Id. 362; *Spalding v. Archibald*, 52 Id. 365; *Wilson v. Maltby*, 59 N. Y. 129.
2. How. Stat. § 6190, applies to this case.
3. No construction that can be put upon Gamble's telegram will give Osgood authority to give the receipt to defendants; citing *Thomas v. Greenwood*, 69 Mich. 215; and the receipt recited that the logs were to be sawed into lumber according to the contract with Gamble, which provided for its removal by Gamble from Osgood's dock.
4. If there was any question as to possession, it should have been submitted to the jury. Even though these advances for lumbering were claimed to be or were made in good faith, this would not affect the bill of sale of plaintiffs, properly recorded; citing *Talcott v. Crippen*, 52 Mich. 634; *Bank v. Summers*, 75 Id. 111; and see *Sheldon v. Warner*, 26 Id. 403, 407.
5. The lumber from the Webber land being owned by Gamble, the burden of proof was on the defendants to show a change of possession under the statute cited, which they failed to do, and the circuit judge should have so instructed the jury.

McKnight, Humphrey & Grant, for defendants, contended:

1. The least that could be claimed for defendants' title to the land would be that they held as trustees, and this put the legal title in them, and neither Gamble nor his grantees could get any title to the lands or timber except through the holders of the legal title; citing *Beardslee v. Horton*, 8 Mich. 562; *Forrest v. O'Donnell*, 42 Id. 558; *Henderson v. Sherman*, 47 Id. 267; *Atwood v. Frost*, 57 Id. 234.
2. Under the statute of frauds, conveyances of land or interests

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therein must be by deed; and that which is evidenced by deeds of conveyance cannot be changed by parol testimony of promises, agreements, or understanding; citing *Hayes v. Livingston*, 34 Mich. 384.

3. It is true that a parol license to cut standing timber is good until revoked; citing *Morrill v. Mackman*, 24 Mich. 279; but in this case the plaintiffs' evidence shows that they had no license or authority to cut timber into logs from the Webber lands, and they seek to establish a title to them by showing a title by parol to the lands from which they were taken; and the only license Gamble had from the defendants to cut was under the terms of the contract, by which the rights of the parties would be measured, so far as any license was concerned; citing *Sovereign v. Ortmann*, 47 Mich. 183; *Rust v. Bennett*, 39 Id. 521.

4. The defendant in replevin may controvert the plaintiff's title, and he may show title in a stranger; citing *Busch v. Nester*, 70 Mich. 530, citing with approval *Halleck v. Mixer*, 16 Cal. 579.

5. Charging Gamble on defendants' books with the purchase price of the lands and the amount of supplies advanced to him by them was not an admission that the property was his, nor could it affect the title to the property; citing *Hood v. Olin*, 68 Mich. 171.

LONG, J. These are actions of replevin, brought in the Wayne circuit court to recover possession of 2,100,000 feet, board measure, of pine lumber manufactured at Sailors' encampment, Chippewa county, this State, from logs marked "H. G." and circle "G.," and brought from Sailors' encampment to Detroit on the steam-barges Negaunee and King, and tow-barge Teutonia. In the Gamble case the lumber taken under the writ was from the barge Negaunee, and comprised about 600,000 feet. In the Sibley case the lumber taken under the writ was from the barge King and its tow, Teutonia.

The causes were tried before a jury, who returned verdicts in each case by direction of the court in favor of the defendants. The defendants waived return of the property, and took judgments for its full value. In the

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Gamble case the judgment was for $6,070.55, and in the Sibley case for $10,382.91.

The plaintiffs bring error.

Both cases grow out of the same transaction, and involve the title to certain lands and timber from which the lumber was manufactured. Whatever rights the plaintiffs have in the Sibley case they acquired through Henry Gamble under a certain chattel mortgage upon the lumber taken from the barges King and Teutonia. Henry Gamble resides at Saginaw, this State. Isaac Bearinger also resides in Saginaw, and Hiram W. Sibley resides in Rochester, N. Y. These last-named gentlemen are doing a lumbering business at Saginaw under the firm name of Sibley & Bearinger.

The facts as they appeared upon the trial of the causes are, substantially, that on November 24, 1886, Henry Gamble, plaintiff in the first suit, entered into a land contract with James G. Ross, of Quebec, Can., doing business under the firm name of Ross & Co., by which he agreed to purchase a large quantity of pine timber on lands situate in the Upper Peninsula of this State for the sum of $30,000, to be paid $5,000 on delivery of contract, and the balance in two payments of $12,500 each, payable in one and two years from the date of the contract, with interest at 7 per cent. This contract contained the usual conditions specified in contracts for the purchase of pine timber, and included an agreement by which the ownership and possession of the timber was retained in the first party until the purchase price was fully paid. The timber was to be removed within five years from the date of the contract.

On August 4, 1886, Gamble purchased from William L. Webber 640 acres of pine land, situate in the same township wherein a portion of the timber described in the Ross contract is situate. The contract with Webber

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also provided that Gamble should remove no timber or logs from the land, without the written consent of the first party, until full payment was made. The purchase price of the Webber land was $6,500, payable $500 on delivery of contract, $2,000 on or before January 1, 1887, $1,000 on or before January 1, 1888, $1,500 on or before January 1, 1889, and $1,500 on or before January 1, 1890, with interest on deferred payments at 7 per cent., according to four promissory notes bearing even date.

On December 30, 1889, Gamble entered into a contract with William, Frank, John Theodore, Frances Ella, and Annie Ross, heirs and successors of said James G. Ross, deceased, which contract recites the execution of the contract for the purchase of pine timber of date November 24, 1886, from James G. Ross, and recites that Gamble desired to manufacture the pine timber growing upon the land described in that contract into wany board pine timber for the Quebec market, and also into saw-logs. It also recites that there is a balance due upon the James Ross contract of $21,394.78. The contract further provides for the manufacture of the wany board pine on the Ross land prior to May 1, 1890, by Gamble, and it also provides for the making of certain advances by the Rosses to Gamble from time to time, as the manufacture of the timber progressed, and for the payment of freight to Quebec. The contract also provides that for all saw-logs manufactured from said timber the second party should receive certain advances. By this contract the Rosses were to sell the wany board pine timber in the Quebec market, and retain the money advanced upon it, with interest at 7 per cent., and 5 per cent. commission to be held for services in conducting said business, which amount was to be deducted from the proceeds of this timber, as well as the expense of James Connolly, the agent of the Rosses, in looking

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after the timber; and, in addition to these deductions, first parties were to deduct the balance due on the contract of November 24, 1886, together with the interest. The contract further provides for the manner of manufacturing the wany board pine timber; further, that all the timber and logs so manufactured should remain the property of the first parties until all the said advances, interest, and commission, and the amount due for stumpage on the contract of November 24, 1886, should have been paid; specifies the method of marking the timber with the Rosses' mark, and for an accounting. The contract also contains the following provision:

"It is further understood and agreed that the said second party shall give to the said first parties an assignment of his contract which he holds from William L. Webber, of East Saginaw, Michigan, for the purchase of lands or interest in lands described as follows."

Here follows a specific description of the lands, and then the contract further provides:

"As collateral security to the said first parties that he will execute and carry out the contract herein contained, and pay the balance due the said parties of the first part under the said contract of November 24, 1886, above referred to, made and executed with Ross & Co., as aforesaid."

It also provides that the parties of the first part, the Rosses, should dispose of the saw-logs so manufactured, and out of the proceeds deduct the money advanced and the interest at 7 per cent., 5 per cent. commission, and the expense of Connolly, their agent; the balance to be applied to the payment of the contract of November 24, 1886, until the same should be fully paid. This contract also refers to a contract made by Gamble with J. Burstall & Co., of Quebec, dated December 2, 1889, for the sale of the wany board timber. On December 2, 1889, Gamble entered into a contract with J. Burstall & Co.,

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of Quebec, by which he agreed to sell to them 100,000 cubic feet of wany board pine timber, to be delivered at Purchaser's Cove, Quebec, not later than July 15, 1890.

It appears that Mr. Gamble entered upon the performance of the contract of December 30, 1889, in the winter of 1889–90, and got out about 80,000 cubic feet of wany board timber from the Ross lands, described in the contract of November 24, 1886. It appears also that Gamble was unable to obtain from the Ross lands the full quantity of wany board pine timber to fulfill his contract with J. Burstall & Co., and he called upon Mr. Connolly, who represented the Rosses, and explained to him the difficulty, and that he might be held for damages under the Burstall contract; but that, if he could cut from the Webber lands the balance that he needed, he could fulfill his contract with Burstall. He also wrote Mr. Connolly on March 25, 1890, that there was $3,600 due on the Webber lands, and before he could cut any timber it would be necessary to pay that amount; that he had explained this matter to Mr. Frank Ross when he was in Quebec. He then says:

"I wish you would see about this matter, as we will have to commence and cut the latter part of next week, and it will be necessary to see that this is paid before I cut any. Then I can get a deed of the property, and your security will be good."

Mr. Connolly answered this letter on the 27th, and stated to Mr. Gamble that he noted what he said about the Webber lands; that he would write Ross about it, and get his instructions to draw for the amount, and would then instruct him when to get the deed. On April 8 Mr. Connolly again wrote Mr. Gamble upon this subject as follows:

"*Dear Sir:* I find from a letter received here yesterday

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that your men have left camp No. 2 on the south side of the road, and have gone to Wellsburg, to commence making, I presume, on the Webber lot. There is also one gang, as far as I can learn, gone to Louk's camp, to make what is there. I had a letter from Quebec with reference to making advances to pay balance due on the Webber lot, in which they say they will make advances if you can lumber and put in the river the whole of this lot on or before the first of June next. Now, the question is, can you do it? If you think you can, you had better make arrangements with Webber for the deed; but I do not think you can do so, unless you go there and attend to the matter yourself. I would not feel justified in making the advances unless you go and remain there, and put some capable man there to make the timber and cut the logs at once. So please let me know at once what you intend doing."

It appears that Mr. Gamble, after the receipt of this letter, proceeded to cut the square timber on the Webber lands to fulfill his contract with Burstall & Co. At the time he commenced cutting he had not yet arranged the payments with Mr. Webber, but on June 6, 1890, he wrote Mr. Connolly as follows:

"*Dear Sir:* * * * I arranged with Webber. I gave him a draft on you for $3,600; that is, to close up the land deal. He does not know that we were cutting, and I would like to have the matter closed up as soon as the papers are ready. I made out an assignment. He is to make out a warranty deed for Ross & Co. on the estate. Mr. Weadock is looking after the matter, so you can feel assured that the papers will be right. Now, Mr. Connolly, you be sure and have this Webber business fixed up."

On the date of this letter Mr. Gamble assigned his contract with Webber of date of August 4, 1886, to the defendants Ross. This assignment contains the following clause:

"*Whereas*, there yet remains unpaid upon the purchase price of said land the sum of $3,600; and *whereas*, said

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first parties to said contract last above named have agreed to advance the said sum of $3,600 to pay said Webber said balance:

"Now, therefore, the said Henry Gamble, for a valuable consideration to him paid, and for the purposes stated in said contract of December 30, 1889, and to secure said Rosses for the amount advanced to pay the purchase price of said land, does hereby sell, assign, transfer, and set over said contract to the Rosses above named, and hereby authorizes said Webber to make, execute, and deliver to them the warranty deed of said land specified in said contract to said first parties in said contract of December 30, 1889, for the purposes aforesaid."

On the date of the execution of this assignment, William L. Webber and wife executed and delivered to the Rosses a warranty deed of the land described in the land contract between himself and Gamble and assigned to the Rosses by Gamble. This deed was recorded June 21, 1890, in the proper office. Mr. Connolly, the agent of the Rosses, paid to Mr. Webber, on the delivery of this deed, the balance—$3,600—due him. It is conceded that the title to the lands and timber described in the Webber contract was in Webber in fee-simple at the date of the contract. It is also conceded that the Webber land was valuable only for the pine timber upon it.

It appears that on May 1, 1890, Henry Gamble, the plaintiff, entered into a contract with C. Weller & Son, of Sault Ste. Marie, Mich., by which they were to cut and bank all the white and Norway pine suitable for timber upon certain descriptions of land. These lands were in part the Webber lands, and in part what was known as the "Ross Lands." In pursuance of this contract, Weller & Son lumbered the pine timber, or most of it, from the land described, and Gamble, entered into a contract on June 2 with Moiles' Tug Line to tow the logs from where they were banked to the John Spry Lumber Company mill at Sailors' encampment, on Nee-

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bish island, in the river St. Mary. Gamble also on the same date entered into a contract with S. W. Osgood, of Sault Ste. Marie, who operated the John Spry mill, to manufacture these logs into lumber. By the terms of this agreement Gamble agreed to furnish Osgood at his mill on Neebish island 3,000,000 feet or upwards of pine logs, to be delivered in the boom at the mill during the sawing season of 1890, and to pay Osgood the sum of $2.50 per M. feet, board measure, for all the lumber sawed, and the number of feet so sawed to be determined by the return made by the tallyman, who was to be agreeable to both parties.

At the time Gamble entered into the contract with the Ross heirs—December 30, 1889—he had defaulted on the Ross contract, as well as the Webber contract. On the Webber contract a decree had been entered against him forfeiting his rights under that contract.

The plaintiff's testimony tended to show that he took enough square timber off the Webber land to fill the balance of the Burstall & Co. contract, which was about 11,700 feet. This timber from the Ross lands as well as the Webber lands was delivered to Burstall & Co., and the Rosses had the proceeds—about $35,000. They had in the meantime advanced to the plaintiff some $17,000 to get out the timber, so that the account between Gamble and the Rosses, at the close of the Burstall contract, stood about as follows:

Due to the Rosses under the first contract, as acknowledged by the contract of December 30, 1889	$21,894 78
Advances made by the Rosses	17,000 00
Paid Mr. Webber for deed	3,600 00
	$41,994 78
Cr. By moneys from Burstall contract	35,000 00
Balance due Rosses	$6,994 78

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Mr. Gamble testifies that the indebtedness at this time must have amounted to about $5,000.

On May 1, 1890, Gamble entered into the contract with Weller & Son to lumber the Webber lands, and the Ross lands which adjoined them. These lands were lumbered by Weller & Son, the logs taken to the Osgood mill, and cut into lumber. Mr. Gamble testifies that it was understood by Mr. Connolly and himself at the time this contract was let that the Ross lands adjoining the Webber lands contained something over 2,000,000 feet. The lands were lumbered under the direction of the plaintiff, and under his direction the logs were taken to Osgood's mill, and there manufactured into lumber. Mr. Gamble says that at the time the Weller & Son contract was entered into it was intended that the logs from the Webber and the Ross lands should be separately marked, so that they could be distinguished, but that the cutting was commenced in his absence, and they were intermingled; but he gives an estimate of the amount coming from each tract. He claims that the timber coming from the Webber lands was superior in quality to that from the Ross lands, as the logs from the Webber lands were from green timber, while the Ross lands were burned over and the timber worm-eaten. Aside from the Ross lands lumbered were other lands specified in the contract of December 30, 1889, which were not lumbered, and upon which there is estimated by Mr. Gamble to be about 6,000,000 feet. All the logs cut under the Weller & Son contract from both tracts amounted to 2,552,779 feet, of which only 433,727 feet came from the Ross lands, the balance being taken from the Webber tract.

From the time the lumbering commenced the defendants made advances to Mr. Gamble. They advanced on the Weller & Son contract, $8,586.48; they paid for transportation to Waiska bay by rail, $4,049.90; they paid for

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the towing to the mill, $1,250.60; and they also paid the saw-bill to Osgood, $5,728.91. Mr. Gamble claimed at first to have paid on the lumbering about $500 in supplies; but admitted that this was settled for under the Burstall contract. The total amount paid by defendants on this lumber amounted to $19,615.89.

It is claimed, however, by Mr. Gamble, that there was no arrangement with the defendants by which they were to advance anything for lumbering the Webber lands; that those advances were for cutting and manufacturing into lumber the logs from the Ross lands adjacent to the Webber lands; and that the defendants never claimed that these advances, or any part of them, were on the Webber logs and timber until it was found that the logs from the Ross lands fell short of the 2,000,000 feet, and that then for the first time the defendants claimed the advances were made upon the lumbering on the Webber lands as well as upon the Ross lands. While this is in dispute, the court having directed the verdict in favor of the defendants, we must take the testimony of the plaintiff as true in determining the questions raised.

The logs were thus intermingled and sawed at the Osgood mill. After the lumber was sawed,—or a portion of it,—and piled upon the Osgood dock, Mr. Gamble sold and shipped some 480,000 feet to Chicago parties. In November he procured the three barges, and commenced loading them from the dock, when the defendants brought suit there in replevin, and took charge of the lumber, claiming to be the rightful owners. What the *status* is of this replevin suit is not shown; but after this replevin suit the defendants proceeded to load the lumber on the three barges, and conveyed it to Detroit, where these suits were commenced. This left only about 180,000 feet of lumber at Osgood's mill, cut from all the lands, and that part of it so left was of an inferior quality.

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It is claimed by the defendants that the advances so made by them were upon the Webber logs as well as those cut from the Ross lands, and that they are the legal and equitable owners of the whole timber. It appears further in the case that on June 23, 1890, Mr. Connolly, acting for the defendants, made a demand upon Osgood that he receipt for the logs as fast as they came into the mill-boom, in the name of the defendants. This applied to all of the logs taken from the Ross lands as well as those taken from the Webber lands. Upon receipt of this demand, Mr. Osgood telegraphed Gamble at East Saginaw as follows:

"Connolly demands that I give Ross & Co. receipts for your rafts, and hold lumber subject to their order. Wire me instructions.

"S. W. OSGOOD."

Mr. Gamble wired back, saying:

"Yes, you can give Connolly receipt for my raft."

On the 24th day of June Mr. Gamble also gave to Connolly, for Ross & Co., the following order:

"BAY CITY, MICH., June 24, 1890.

"S. W. OSGOOD, ESQ.,
"Sailors' Landing.

"*Dear Sir:* You will please hold, subject to the order of John Ross & Co., all the logs I have delivered and will deliver from Waiska bay, about (3,500,000) three million five hundred thousand feet. I am going up to-morrow or next day, and will give you instructions how to cut them into lumber, which lumber you will hold subject to their order.

"Yours truly,
"HENRY GAMBLE."

A copy of this order was served by Ross & Co. on Osgood immediately after it was given, and Osgood gave to Connolly, for Ross & Co., the following receipt:

"Received of John Ross & Co. raft of pine logs marked 'G. and H.,' which are to be manufactured into lumber

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as per contract with Henry Gamble, and will hold the lumber produced by said logs subject to the order of John Ross & Co., they guaranteeing payment of saw-bill on same according to terms of contract.

"S. W. Osgood."

Mr. Gamble claims that this order was presented to him, and he signed it without knowing its contents.

The claim of the plaintiff in the Gamble case is that in the lumbering of the Webber lands the Rosses had nothing to do; that Mr. Gamble was in possession of the lands all the time, and continued to be in possession of the land and saw-logs cut from it, and the lumber manufactured from them, up to the latter part of November, 1890, when Connolly shipped the lumber to Detroit; that the lumbering of those lands was completed some time in September, or the latter part of August, 1890; that the Rosses had no part in lumbering or the delivery of the logs or the manufacturing of the logs specified in the Weller & Son contract.

The plaintiff relies upon but two propositions:

1. That, under all the evidence, the court should have directed a verdict in favor of plaintiff.
2. That, if this view cannot be sustained, at least certain questions were raised which should have been submitted to the jury.

He claims that defendants never had any interest in the Webber lands, except as mortgagees, as collateral security, in the contract of December 30, 1889, and for the payment of the $3,600 advanced to Mr. Webber to pay the balance due him on the purchase price of the lands; and that, while the contract of December 30, 1889, referring to the Webber contract, followed by the delivery to the defendants of the warranty deed from Mr. Webber and the payment to Mr. Webber of the balance of the purchase price, placed in defendants the record title to the Webber lands and the

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timber thereon, yet that such title was defeated, so far as the passage of the legal title was concerned, by a contemporaneous defeasance thereof; that it was as security only, and Mr. Gamble was the owner of the whole property, subject to defendants' mortgage interest; and that while they (the defendants) might have the right to proceed in a court of equity to restrain Gamble or any one else from cutting timber or in any way depreciating their security, when they did not do so, and permitted him to cut and remove the timber from the land, when it was once severed from the land and removed it became the personal property of Mr. Gamble, free from the mortgage; and that he could, from the time of its being severed from the land, do with it as he saw fit, either sell or mortgage it.

It is further contended that, should it be found that Gamble was not the legal owner of the timber while on the land, he was the equitable owner; and when he was permitted to sever it he became the legal owner of the logs and the lumber into which it was manufactured, and as such owner he had continued possession up to the time of its removal from the docks by the defendants.

It is also contended that when the defendants permitted Gamble to cut the timber from the Webber land it was a waiver of their rights upon it as security, and constituted a license to cut, which, by reason of its exercise, vested the title and ownership of the lumber in question in Gamble.

The contract between Mr. Gamble and Mr. Webber was dated August 4, 1886. This was a contract to purchase the land in controversy. The title was in Mr. Webber, and did not vest in Mr. Gamble under the contract. It was held in *Buell v. Irwin*, 24 Mich. 145, that—

"An executory contract for the sale of land has no

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tendency to show any legal title in the vendee, nor in any person claiming under him."

It was further held that, if the contract does not purport to convey any legal possessory interest in or upon the land, it does not give the vendee a legal right to the possession of such land.

Under the Webber contract Mr. Gamble had no rights except to purchase within a given time for a certain given sum. He could remove none of the timber. He had an equitable interest, and was entitled to have the legal title upon the conditions being performed. On December 30, 1889, and after the Webber contract had been declared forfeited, he entered into the Ross contract. By the terms of this contract he was to assign the Webber contract as collateral security that he would perform the contract of December 30, 1889, with the Rosses, and pay the balance due under the original contract of November 24, 1886. On June 6, 1890, Gamble did assign to the Rosses the Webber contract, reciting that the assignment was made for the purposes stated in the contract of December 30, 1889, and to secure the Rosses for the moneys advanced to pay the purchase price of said land. By the terms of this assignment Mr. Webber was authorized to make the deed of the lands to the Rosses. On the same date Mr. Webber made and delivered the deed to the Rosses. These papers must be construed together. While the deed is absolute in form, yet the contracts, with it, clearly evidence the intention of the parties. It was not intended by Mr. Gamble, nor understood by the Rosses, that the Rosses were to have the title absolutely in fee. The deed was intended as a mere security, and the conditions upon which the Rosses took it are clearly indicated in the assignment of the contract executed on the same day,—*i. e.*, a reconveyance of the land upon

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the performance of these conditions. It must therefore be treated as a security, or, in other words, a mortgage. It falls within the principles laid down in *Enos v. Sutherland*, 11 Mich. 538; *Ferris v. Wilcox*, 51 Id. 105; *Jeffery v. Hursh*, 58 Id. 246. The several contracts and the deed must therefore be treated as a mortgage, under which the Rosses were secured for the advances made for the purchase of the Webber land and the faithful performance of the contract of December 30, 1889.

We have seen from the plaintiff's own showing that these advances have not been paid, and the contract has never been fully performed. The legal title was vested in the Rosses, subject to be defeated and vest in Gamble on the performance of the conditions. These conditions not being performed, Gamble was not in a position to demand his deed. The mere fact that the Rosses permitted Gamble to lumber the Webber land with their land would not be a waiver of their rights under this security, under the circumstances admitted upon this record by plaintiff Gamble.

Plaintiff insists, however, and so testifies, that the defendants had nothing whatever to do with the lumbering of the Webber lands, made no advances upon those logs or lumber, and no agreement was ever made that they should do so. He also insists that he never knew the contents of the order given by him upon Osgood to hold the lumber subject to the order of the Rosses; that he signed the paper without knowing its contents. Under the plaintiff's claim it was a question of fact for the jury whether defendants made advances upon the logs from the Webber lands. It was also a question of fact whether the plaintiff knowingly signed the order to turn the lumber over to the Rosses which was manufactured from the Webber lands. The court was in error in not submitting these questions to the

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jury. If the defendants did make advances upon the lumbering of the Webber lands, and the plaintiff so understood, and assented to it, and received the advances, it is very strong evidence that the defendants did not intend to release their security upon the Webber lands and the timber thereon, and that the plaintiff did not understand that the defendants intended so to do. These circumstances would show pretty clearly that the parties understood that the Webber lands were still held as security by the defendants. If, on the other hand, the advances were not made on the Webber logs, and not so understood or intended, it would be some evidence that the defendants were permitting the plaintiff to handle the Webber timber as he saw fit, and were taking their chances that he would apply the proceeds to the payment of his indebtedness to them under the contract.

If the plaintiff signed the order on Osgood, set out above, to hold the logs and lumber subject to the order of the defendants, knowing its contents, it would also be strong evidence that the parties understood the advances were made upon the logs from the Webber land as well as from the Ross land, and that they did not intend to release their security thereon. On the other hand, if the advances were not made upon the Webber land, and Gamble did not understandingly sign the order upon Osgood to hold the logs and timber subject to the Rosses' order, but his signature was obtained by misrepresentation or fraud, and he lumbered the Webber lands upon his own account, being in possession of the same all the time, making all the contracts for lumbering, hauling, sawing, etc., with the knowledge and consent of the Rosses or Connolly, the jury might be justified in finding that the lien under their mortgage was waived, and they were looking personally to Gamble to make payments on the contract.

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If these facts are established (and they are questions for the jury), and the defendants waived their lien under their mortgage security, or did not intend to insist upon it, but to look to Gamble personally, then the plaintiffs would be entitled to recover in each case, as Sibley & Bearinger would have acquired under their chattel mortgage all the rights which Gamble had. Of course this can apply only to the lumber from logs coming from the Webber lands in either case. If, however, Gamble had no right to recover, it is difficult to see how Sibley & Bearinger could recover under the circumstances stated. If defendants' contention is right, they had at least a mortgage interest. They made advances to lumber the logs from the land, and before the chattel mortgage was given had obtained from Gamble the order for Osgood to hold the lumber for them, and subject to their order. Osgood agreed so to hold it. This applied to all the lumber. The defendants had taken such possession as it was possible to take under the circumstances. Sibley & Bearinger could have been protected by making the least inquiry of the parties in possession. They do not claim to have done this.

The court properly held that the claim of defendants upon the lumber was not void by reason of not being filed as a chattel mortgage.

For the errors pointed out both cases must be reversed, with costs, and new trials ordered.

CHAMPLIN, C. J., MORSE and MCGRATH, JJ., concurred. GRANT, J., did not sit.

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JOSIAH H. GIBBS v. SCHOOL-DISTRICT NO. TEN, FRACTIONAL, OF THE TOWNSHIP OF COLFAX.

School-districts—Issue of bonds—Bona fide purchaser.

1. The purchaser of a school-district bond need look no further back than its face for the facts which show a compliance with the statute under which it is issued.
2. The failure of the director of a school-district to keep a record of the order of the district board directing him and the moderator to issue a school-district bond will not affect the title of a *bona fide* holder of the bond, where the fact of the making of said order is recited upon the face of the bond.
3. Where the statute makes the district board, who are empowered to issue the bond, the body to determine when the statutory facts authorizing its issuance exist, which facts appear upon the face of the bond issued by their direction, the district cannot defend as against a *bona fide* holder upon the ground that the law was not complied with previous to the determination of the district board to issue the bond.

Error to Mecosta. (Palmer, J.) Submitted on briefs October 9, 1891. Decided November 13, 1891.

Debt. Defendant brings error. Affirmed. The facts are stated in the opinion.

Dumon & Cogger, for appellant.

M. Brown, for plaintiff.

CHAMPLIN, C. J. This action was brought to recover the amount of a certain bond issued by defendant school-district, as follows:

"No. 1. ISSUE OF THREE HUNDRED DOLLARS. $300.00.

"*State of Michigan, County of Mecosta.*

"SCHOOL-DISTRICT NO. 10, FRACTIONAL, OF THE TOWNSHIP OF COLFAX.

"School-district No. 10, fractional, of the township of

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Colfax, county of Mecosta, State of Michigan, hereby acknowledges itself indebted in the sum of three hundred dollars, lawful money of the United States of America, bearing interest at the rate of eight per cent. per annum from the date hereof, payable annually, and said sum of money the said school-district hereby promises to pay to the holder hereof on the fifth day of April, A. D. 1889, the interest aforesaid to be paid annually from date, according to interest coupons hereto annexed, and both principal and interest payable at the Northern National Bank, Big Rapids, according to a loan authorized by a two-thirds vote of the qualified voters of said school-district, at a special school meeting held at the school-house in said district at 7 o'clock P. M. on the twenty-ninth day of September, A. D. 1885, in accordance with sections 15 and 16 of chapter 2 of Act No. 164, Session Laws of 1881.

"In testimony whereof the moderator and director of said school-district have, by the order and direction of the district board of said school-district, officially hereunto subscribed their names and the corporate name of said school-district, and executed this bond, at Rodney, Mecosta county, this fifth day of November, A. D. 1885.

"SYLVESTER BURDICK, Director.

"WILLIS WOOD, Moderator."

Four interest coupons were attached. There was no denial of the execution of the bond under oath filed with the plea.

The defense upon the trial relied upon the records of the school-district board failing to show any legal authority for the issue of the bond. The records of the school-district showed that there was what was claimed to be a special meeting held on the 29th day of September, at the time stated in the bond, and that some action was taken at that meeting with reference to the issue of such bond.

Under the statutes of this State school-districts having less than 30 children between the ages of 5 and 20 years are authorized, when lawfully assembled, by a two-thirds vote of those present, to issue the bonds of the school-

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district for the purpose of paying for a school-house site, and for the purpose of erecting and furnishing a school-house building, such bonded indebtedness not to exceed $300. In school-districts having 30 children of like age they may have a bonded indebtedness not to exceed $500; and the statute proceeds to grade the amount of indebtedness according to the number of scholars, until it shall not exceed $30,000. The statute also provides:

"Whenever any school-district shall have voted to borrow any sum of money, the district board of such district is hereby authorized to issue the bonds of such district, in such form, and executed in such manner, by the moderator and director of such district, and in such sums, not less than fifty dollars, as such district board shall direct, and with such rate of interest, not exceeding eight per centum per annum, and payable at such time or times, as the said district shall have directed." How. Stat. §§ 5103, 5104.

Purchasers of municipal bonds are bound to know the extent and limitations upon the authority of the corporation to issue the bonds. They are bound, in other words, to know the law under which the authority is exercised. Purchasers of such securities have a right to rely upon all facts asserted or appearing upon the face of the bonds made by any person or body authorized by law to pass upon and determine the facts.

In purchasing this bond the purchaser was bound to know that school-districts have no authority to issue bonds except for the purposes specified in the statute, and that their authority is limited by the number of scholars between the ages of 5 and 20 years then residing in the district; that there must be a two-thirds vote of the qualified electors in favor of their issue. The purchaser is chargeable with knowledge of the prerequisites of a legal special meeting, and of the provisions for a board of inspectors and their duties, and of the requirement that the vote shall be by ballot.

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The recitals in this bond are made by the director and moderator, who compose a majority of the school board. Neither the school board nor the moderator and director are authorized to issue the bonds unless voted by the district at a lawful meeting; and, under section 5104, before the board can act, they have a function to perform, in its nature somewhat judicial, and that is as to their own authority to issue the bonds. The statute limits that authority to bonds voted by the school-district, and consequently the question whether the proceedings to vote such bonds are such as will authorize the board to issue them must be passed upon by the board. A purchaser of the bonds, therefore, need look no further back than the face of the bonds for the facts which show a compliance with the law.

We think the assertion appearing upon the face of the bond is sufficient evidence to an innocent purchaser that the board ordered and directed the bond to be issued. The officers signing the bond are two of the three officers who constitute the board, and the director is the officer who the statute requires shall make a record of the proceedings of all district meetings and the orders, resolutions, and other proceedings of the board. It matters not, therefore, that the records kept by the board do not show the order of the board to execute the bond. The title of a *bona fide* holder of the bond cannot be defeated by a neglect to enter the order in cases where the face of the bond, upon which he has a right to rely, recites the fact that such order was made.

This case is not controlled by *Spitzer v. Village of Blanchard*, 82 Mich. 234. In that case there was a limitation upon the authority to borrow money in excess of a certain percentage upon the taxable property. In that

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case the law did not designate any body or board to pass upon the facts, and only permitted the bonds to be issued for "loans lawfully made." The bonds could only be issued upon the vote of the electors, and the bonds did not recite that such a vote was taken. In that case (p. 244) we said that,—

"Where there is a total want of power, under the law, in the officers or board who issue the bonds, then the bonds will be void in the hands of innocent holders, the distinction being between questions of fact and questions of law. If it is a question of fact, and the board or officers are authorized by law to determine the fact, then their determination is final and conclusive. And although it may be contrary to the fact, yet, if recited in the bond that the necessary and proper steps required by law to be taken had been taken, then the municipality is estopped from denying that they were taken."

The law under which these bonds were issued authorized the school board to issue them, and made that board the body to determine when such facts existed; and hence when the bonds were issued by their order, that fact appearing upon the face of the bond, a *bona fide* holder is entitled to recover, and, as against him, the district is not allowed to defend upon the ground that the law was not complied with previous to their determination to issue the bonds. The law having placed that responsibility with the district board, the school-district, if defrauded, must seek its remedy against such board.

The judgment is affirmed.

McGRATH, LONG, and GRANT, JJ., concurred.

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SAMUEL HESS v. FREDERICK C. MEYER.

[See 73 Mich. 259.]

Surveys—Lost section corners.

The Court adhere to the law laid down in the opinion reported in 73 Mich. 259, which governs the method of ascertaining and relocating lost section corners on township lines.

Error to Berrien. (O'Hara, J.) Argued October 9 and 13, 1891. Decided November 13, 1891.

Ejectment. Defendant brings error. Affirmed. The facts are stated in the opinion.

Edward Bacon, for appellant.

George S. Clapp, for plaintiff.

CHAMPLIN, C. J. We directed a new trial to be had in this case upon reversing the judgment rendered upon the first trial of the case. In the opinion handed down we stated the law which governs the method of ascertaining and relocating lost section corners on township lines. Our attention is called to a circular issued by the Secretary of the Interior in March, 1883, giving directions as to the method to be pursued in the restoration of lost or obliterated corners of the United States government surveys. The plaintiff's counsel contends that, inasmuch as the township line involved in this controversy was made the basis of subdivisions of the township both on the north and south of such line, lost corners should be restored in the same manner as if such corners were on a base or correction line, and that the rule laid down by the Secretary of the Interior for the restoration of lost

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or obliterated corners on base and correction lines should be the method pursued in restoring the lost corners upon this township line.

In the circular referred to the method established by the Department of the Interior for the restoration of corners on base and correction lines is as follows:

"Run a right line between the nearest existing corners on such line, whether base or correction line, which corners must, however, be fully identified, and at the point proportionate to the distance given in the field-notes of the original survey establish a new corner. This point should be verified by measurements to the nearest known corners north or south of the base or correction line, or both."

And counsel urges that in this case the quarter section post between sections 34 and 35 on the north of the town line, and the quarter section post between sections 2 and 3 south of the town line, being known monuments, established by the government survey at 40 chains, respectively, from the town line, should control the position of the section corner post at the north-east corner of section 3, in preference to the survey of the township line between two established and known monuments upon the township line. But the instructions not only do not direct this to be done, but merely suggest that such point may be verified by measurements to the nearest known corners north or south of such line. If it should be found that the monuments north and south of such line corresponded to the measurements made by the United States survey, it would afford a strong inference that the new location, based upon the survey of the right line between the nearest existing corners on such line, was correct; but it was not the intention, as we conceive, of the Secretary of the Interior to give to such measurements a controlling influence in the location of the lost corner.

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In this case the testimony shows that the quarter posts north and south of the line upon the east line of sections 3 and 34 are 79.52 chains apart, while the field-notes of the government survey make their distance apart 80 chains, or 40 chains on each side of the town line. Here is an actual shortage in distance of 48 links, or 31.68 feet. It is evident that there was an error in the actual survey and location of one or the other of these quarter posts by the United States government. It therefore affords no criterion for verification. The mistake may have been made in the measurement north or in the measurement south, and it is quite unlikely that a mistake of 24 links in distance should be made when this particular line on the north was surveyed, and a like mistake when the line upon the south township was subdivided; especially so when no such error exists upon the section lines bounding these sections upon the west.

The court below instructed the jury in accordance with the law as laid down by us in the opinion reported in 73 Mich. 259. The testimony introduced in the case was conflicting, and it was fairly submitted to the jury. There was testimony which tended to prove that the corner post at the north-east corner of section 3 was located by the United States survey at the point claimed by the plaintiff.

We discover no error in the record, and the judgment is affirmed.

The other Justices concurred.

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CHAUNCEY E. MITCHELL v. ALEXANDER R. BECK.

Statute of frauds—Promise to pay debt of another—Principal and agent—Conduct of counsel—Charge to jury.

1. The language of plaintiff's counsel in closing the case to the jury (see foot-note p. 346) is held not to have been such a departure from appropriate argument as to call for a reversal of the judgment.[1]
2. Where the performance of the work sued for and its value are undisputed, and the controversy is whether the defendant originally agreed to pay for the labor, or *verbally* agreed to become security up to a certain sum for third parties, at whose mill it was performed, the plaintiff, if entitled to a verdict, should recover the full amount of his claim.

Error to Cheboygan. (Ramsdell, J.) Argued October 16, 1891. Decided November 13, 1891.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

McKnight, Humphrey & Grant, for appellant, contended:

1. The remarks of plaintiff's counsel in his closing argument, to which exceptions were taken, were intended to, and no doubt did, prejudice the jury against the defendant's position and case. The assertion by an attorney that, because the defend-

[1] See, as bearing upon this question, the following cases: *Seligman v. Ten Eyck Estate*, 60 Mich. 269; *Donovan v. Richmond*, 61 Id. 467; *Mayo v. Wright*, 63 Id. 32; *Novock v. Railroad Co.*, Id. 121; *People v. McDowell*, Id. 230, 237; *Battishill v. Humphreys*, 64 Id. 514; *Manufacturing Co. v. Car Co.*, 65 Id. 564; *Bedford v. Penney*, Id. 667, 669; *Miner v. Lorman*, 66 Id. 532; *Amperse v. Fleckenstein*, 67 Id. 247; *Hitchcock v. Moore*, 70 Id. 116; *People v. Montague*, 71 Id. 448; *O'Callaghan v. Boeing*, 72 Id. 669, 674; *Fosdick v. Van Arsdale*, 74 Id. 302; *Bronson v. Leach*, Id. 714; *Laughlin v. Railway Co.*, 80 Id. 154; *Morton v. Railroad Co.*, 81 Id. 423, 437; *Carter v. Hill*, Id. 275, 280; *Dikeman v. Arnold*, 83 Id. 218; *Hirshfield v. Waldron*, Id. 116, *McDuff v. Journal Co.*, 84 Id. 2, 11; *Sweet v. Railroad Co.*, 87 Id. 559; *DeLong v. Booming Co.*, 88 Id. 282.

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ant asks the protection of the statute passed to prevent frauds and perjuries, he is "crawling out of his promise," is unprofessional, and injurious, not only to the defendant in this case, but was an encouragement to all who heard it to disregard those laws which did not suit them. Had the argument been made to this Court no harm would have been done, but it was addressed to a jury,—men who, as we have a right to presume, had not investigated the subject, and who might easily have been prejudiced by such remarks; citing *Cronkhite v. Dickerson*, 51 Mich. 179; *Rickabus v. Gott*, Id. 228; *Hollywood v. Reed*, 57 Id. 238; *Bulen v. Granger*, 58 Id. 276; *Bedford v. Penny*, Id. 428; *Miner v. Lorman*, 66 Id. 532; *Hitchcock v. Moore*, 70 Id. 116; *Carter v. Hill*, 81 Id. 280; *McDuff v. Journal Co.*, 84 Id. 11.

2. In support of the claim that the case should have been taken from the jury, defendant's promise, as shown by plaintiff's testimony, being collateral to that of Smith & Daly, and for the purpose of securing the payment for the work being done by plaintiff for them, counsel cited *Brown v. Hazen*, 11 Mich. 219; *Bresler v. Pendell*, 12 Id. 224; *Gibbs v. Blanchard*, 15 Id. 298; *Hogsett v. Ellis*, 17 Id. 351; *Waldo v. Simonson*, 18 Id. 345; *Welch v. Marvin*, 36 Id. 59; *Baker v. Ingersoll*, 39 Id. 158; *Preston v. Young*, 46 Id. 103; *Studley v. Barth*, 54 Id. 6; *Schoch v. McLane*, 62 Id. 454; *Kelsey v. McDonald*, 76 Id. 198.

Bishop & McMahon, for plaintiff.

CHAMPLIN, C. J. In the spring and early summer of 1889, the plaintiff, who was the owner of a steam-dredge, did some work therewith at the mill-docks of Smith & Daly, at Cheboygan, Mich., and the latter owed him therefor a balance of about $760. As they did not pay this, he ceased to work for them. On August 12 of the same year he resumed the work on a promise that this balance would be paid at once. They paid him $300, and promised the balance the following day. On the 13th, and again on the 14th, of August he demanded his pay, and, not receiving it, on the latter day gave his engineer orders to remove the dredge to the mill of D. C. Pelton, refusing to work longer under the contract with Smith & Daly.

On the evening of the same day he met the defend-

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ant, Beck, at the Grand Central Hotel office, and the contract was made which is the subject of this controversy. It is claimed by the plaintiff that defendant was having a large amount of lumber sawed at this mill under contract with Smith & Daly. Mr. Smith, of the firm of Smith & Daly, had seen both parties during the day, and brought about this interview.

Plaintiff's version of his talk at the hotel with Beck is substantially as follows: Beck said he wanted plaintiff to go on and complete the dredging; that it was of as much importance to him and benefit to him as to Smith & Daly, because he could not get vessels to go there and ship his lumber on account of the shallow water; that if plaintiff would go on and complete the work he would give him his note for the amount as soon as the work was finished; and that any of the banks at Cheboygan would cash the note. This, plaintiff says, he regarded as equivalent to a cash contract, and on the strength of it remained and completed the work. Plaintiff says that Beck agreed to pay for all the work from and including the 12th of August, and on completing the work plaintiff made out the bill, and presented it to A. R. Beck.

Defendant does not admit the conversation as stated by plaintiff, but admits that he had a conversation with him, and says that his agreement was to indorse or accept Smith & Daly's paper for $500. He says that he expected to hold back money due Smith & Daly for sawing to cover his liability to plaintiff. When the bill was presented to him he mistook the amount for $1,900, and said he did not think that he had held back that amount, and when it was explained that the bill was only for $1,415 he was silent.

There is no dispute as to the amount of the bill, or that the work was done and well done. The mill burned the day the dredging was finished.

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It appears that Beck was an officer and stockholder in the A. R. Beck Lumber Company, a corporation, and the defense to the action rests upon two grounds:

1. That the agreement relied upon by the plaintiff is void under the statute of frauds.
2. That defendant had no personal interest in the dredging, except as a member of the corporation, and that whatever he said or did was as an agent of the corporation.

Proof was introduced in the case tending to support both of these theories. The plaintiff, under the charge of the court, recovered a judgment.

Error is assigned—

1. Upon certain language used by counsel in his closing address to the jury.
2. In the court's not directing a verdict in favor of the defendant after the testimony was closed.
3. Upon the following instructions given by the court to the jury, viz.:

"*a*—If you find that the defendant, Beck, did agree to pay the plaintiff for the dredging done at Smith & Daly's mill from and including August 12, 1889, and that his leading object was not to secure credit for Smith & Daly, but to subserve his own business purposes, and to reap the benefit for himself, real or supposed, and such benefit to himself, or the benefit which he reaped, was the real consideration of his promise, then his undertaking was a valid one, and does not come within the operation of the statute of frauds.

"*b*—If you find that Mr. Beck himself was to receive a direct benefit in exchange for which his promise or undertaking was given, it is wholly immaterial whether Smith & Daly were originally also liable or not."

"*c*—But if you find that the contract was made by this individual, without disclosing his agency, for the benefit of the A. R. Beck Lumber Company, without any reference to the Smith & Daly Lumber Company's interests, then your verdict will be for the plaintiff to the full amount of the labor rendered after the 14th, so that your verdict, if it is for the plaintiff, will be for $1,198.50."

"*d*—If the defendant is liable at all, he is liable to

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the full amount of $1,198.50, and interest from the time the labor was performed up to the present time."

We do not think that the language of counsel in closing the case to the jury was such a departure from appropriate argument as to call for a reversal of the judgment.[1]

Neither do we see any error in the instructions of the court, under the testimony which was introduced before the jury. The case was fairly presented to the jury upon the theory of both parties,—one that it was an original undertaking on the part of Beck, and the other that it was merely a collateral agreement to the undertaking of Smith & Daly. The plaintiff relied upon his own testimony in the case that the undertaking was to pay in full for the work which he did after a certain date. The defendant claimed that he undertook to

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[1] Mr. McMahon, counsel for the plaintiff, in his argument to the jury, used this language:

"We see Mr. Humphrey laugh when he said, 'We agreed to become responsible for $500; but,' he says, 'gentlemen, we are not responsible, we are not liable, because the law will allow us to crawl out of our promises to pay under cover of the statute of frauds.'"

Mr. Humphrey: "I desire an exception to these remarks of counsel to the jury."

Mr. McMahon (resuming): "If he agreed to pay, an honest jury will not go a great ways out of their way to stretch the testimony very far in order to help a man who does not want to pay his just debts."

Mr. Humphrey: "Note an exception to that."

Mr. McMahon: "Yes, sir. I say an honest jury will try to make a man pay what he has agreed to pay, and they will not stretch the evidence, they will not go one hair's breadth out of their way, in order to find the way to let him out on the plea of the statute of frauds; because a promise is a promise, and what a man agrees to do he ought to do, whether the statute of frauds stands in the way or not."

Mr. Humphrey: "Note an exception."

Mr. McMahon: "Therefore, if you let this man go free, this Alexander R. Beck, if you find that he has made a defense under the statute of frauds, I say you will not travel one hair's breadth out of your way to help him make that defense,—you will not help him to come in here and plead the benefit of the baby act."

Mr. Humphrey: "Note an exception."

Mr. McMahon: "That indorsement theory, that collateral theory, was hatched up afterwards, gentlemen."

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become security for the amount of $500 for Smith & Daly. The court was therefore correct in charging the jury that, if the plaintiff was entitled to recover at all, he was entitled to recover for the full amount claimed, and unless he was entitled to the full amount claimed he was not entitled to anything.

His instruction was also correct upon the question of the individual liability of Beck in entering into the contract without disclosing his agency, although he might have been in fact merely an agent acting for the A. R. Beck Lumber Company.

We discover no error in the record, and the judgment is affirmed.

MORSE, MCGRATH, and LONG, JJ., concurred. GRANT, J., did not sit.

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THE DETROIT UNION RAILROAD DEPOT & STATION COMPANY v. THE CITY OF DETROIT AND CHARLES K. TROMBLY.

Depot companies—Taxation—Grain elevator.

A grain elevator erected upon its property by a union depot company organized under the union depot act of 1881 (How. Stat. chap. 93), and used as a grain warehouse in connection with its general business as a common carrier, is a necessary part of the equipment, and is not liable to taxation under the *general tax law* of the State.

Appeal from Wayne. (Reilly, J.) Argued October 28, 1891. Decided November 13, 1891.

Bill to restrain the sale of property for taxes, and

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to vacate an assessment. Defendants appeal. Decree affirmed. The facts are stated in the opinion.

F. A. Baker (*James F. Joy*, of counsel), for complainant.

E. Minock (*J. J. Speed*, of counsel), for defendants.

GRANT, J. The complainant is organized under Act No. 244, Laws of 1881 (How. Stat. c. 93).

Among the general powers conferred by this act upon corporations organized under it is the following:

"To erect and maintain all necessary and convenient buildings, stations, depots, and fixtures for the accommodation and use of passengers, and of freight and other business within the purpose of its organization." Section 4, subd. 5.

Section 21 provides that such corporations shall pay an annual tax of 2½ per cent. upon their gross earnings, said tax to be in lieu of all other taxes upon their property, except such real estate as is owned and can be conveyed by them under the laws of the State, and not actually occupied in the exercise of their franchises, and not necessary for the proper use thereof.

The complainant erected an elevator upon its property in the city of Detroit, on the bank of the Detroit river. The city of Detroit in the year 1889 placed this elevator upon the general assessment roll for said city, and assessed the same for general city purposes to the amount of $3,711.97. Complainant refused to pay, and the defendants were proceeding to a sale of the property, when this bill was filed to restrain the sale. Decree was entered for the complainant.

The decree was correct. It is altogether too narrow a construction of this statute to hold that an elevator is not included in the provision of the law above quoted. This elevator is as essential and necessary to the com-

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plainant in the handling of its grain as is its depot for the use of passengers, or its freight depot for the handling of the general merchandise it carries. It is complainant's grain depot, used in the business of transportation, and only used as a warehouse in connection with its regular business as a common carrier. The Legislature evidently understood an elevator to constitute a necessary part of complainant's equipment, for section 29 of the act provides for the rate of compensation which companies organized under it may charge and receive for elevator service. How. Stat. § 3486. The assessment of this tax was therefore illegal and void.

Decree affirmed, with costs of both courts.

CHAMPLIN, C. J., MORSE and LONG, JJ., concurred. MCGRATH, J., did not sit.

JAMES WHITE, COMMISSIONER OF HIGHWAYS, FOR THE USE AND BENEFIT OF HENRY COTTONHAM, v. JONATHAN BOYCE.

Certiorari—Justices of the peace.

1. There is no practice allowing writs of *certiorari* to issue from the Supreme Court to justices of the peace.
2. The allowance of a writ of *certiorari* from the Supreme Court to a justice of the peace is exceptional, and only favored when necessary to prevent a failure of justice. *Adams v. Abram*, 88 Mich. 302; *Withington v. Southworth*, 26 Id. 381.

Certiorari to review proceedings in justice's court. Argued October 27, 1891. Writ dismissed November 13, 1891. The facts are stated in the opinion.

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Burritt & Canfield, for defendant, and petitioner in *certiorari*.

H. H. Woodruff, for plaintiff, and respondent in *certiorari*.

LONG, J. This action was commenced in justice's court by summons issued April 7, 1891, returnable on April 11. The summons was personally served on the day of its issue. On the return-day the parties appeared and answered, and on motion of the defendant the cause was adjourned until April 25. On that day the plaintiff appeared, and after waiting one hour, and defendant not appearing, plaintiff declared against him, and alleged in his declaration that defendant, during the spring of 1889, maintained a dam on section 20, in township 22 N., of range 2 W., for the purpose of driving logs out of "Denton Creek," so called, in Roscommon county; that, in order to get out and deliver such logs to Houghton lake, the defendant caused said dam to be closed in order to get a head of water in Denton creek, and that whenever said dam was closed, and a head of water maintained, the water in such creek was backed up so as to overflow the highway, known as the "West Branch State Road," which highway was laid out by an act of the Legislature of this State, and had been in constant and public use for more than 14 years prior thereto; that Henry Cottonham, the party for whose benefit the suit is brought, was traveling over said highway, and from the overflow of said highway, caused by the wrongful act of the defendant in maintaining said dam and overflowing said road, certain timbers and logs were floated out of said highway, and the said Cottonham drove into a hole, thereby breaking his wagon, losing his horse, and losing certain fish, to his damage, etc.

Upon the filing of this declaration, plaintiff introduced

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proofs before the justice to sustain his claim, and the justice forthwith rendered judgment in favor of the plaintiff for the benefit of Henry Cottonham for $100 damages, and $4.04 costs of suit. This judgment was not appealed from, and no steps were taken, so far as appears by this record, to remove the cause to the circuit court. On July 3 thereafter, the defendant, by his attorney, made an affidavit, and filed the same in this Court, to obtain a writ of *certiorari*. The writ was allowed and issued, and the proceedings, as above set forth, returned to this Court by the justice.

Plaintiff's counsel contends that the writ was improvidently issued, and should be dismissed.

There is no practice allowing writs of *certiorari* from this Court to justices of the peace. It is true that, under the statute, this Court has power to correct errors of inferior courts, and its jurisdiction extends over courts of justices of the peace; but the practice in this State has been, for errors in justices' courts, to seek redress by appeal, general or special, to the circuit court, or by writ of *certiorari* issuing from that court. If we permitted writs to be taken from this Court to justices of the peace when the party has a right to have his grievance redressed in the circuit, it would be difficult for this Court to reach and decide the numerous cases that would come here, as our docket is already overcrowded.

In *Withington v. Southworth*, 26 Mich. 381, and *Adams v. Abram*, 38 Id. 302, writs of *certiorari* were issued from this Court to a justice of the peace. In the first case, it appeared that the proceeding before the justice was by writ of attachment. The defendants in the writ were not personally served and did not appear in the case. The objection was made in this Court that the plaintiffs in *certiorari* had mistaken their remedy, and should have removed the case to the circuit court by one of the

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modes provided by the statutes. It was said by this Court that,—

"Had the parties been served, or appeared in the court below, there would be force in the objection; but where they are not served, and may not have known or heard of the proceedings until the short time allowed by the statute for taking the case to the circuit court had elapsed, it would operate, in many cases, as a denial of justice, if we were to withhold the common-law remedy in this Court."

The writ was permitted to stand in this Court for that reason, and for the reason that the statutory remedy was gone before this Court was applied to, and there was nothing in the case showing that the defendants had notice of the proceedings in the justice's court in time to avail themselves of their right to appeal to the circuit.

In *Adams v. Abram*, 38 Mich. 302, the proceeding was by attachment from justice's court against non-resident defendants. The writ was not personally served, and the return of the constable did not show that a copy of the writ was left at the last place of residence of any of the defendants in the county, or that there was no such last place of residence. The case was brought to this Court by writ of *certiorari* from the justice's court. A motion was made in this Court to dismiss the writ. This was denied, and it was said by the Court:

"The allowance of a *certiorari* from this Court is exceptional, and we are not inclined to favor it, except where it is necessary to prevent a failure of justice."

The defendant in this case had been personally served with the summons by which the suit was commenced before the justice. He appeared on the return-day, and on his motion the case was adjourned until the 25th of April. He did not appear, and judgment was taken against him on that day, as he might well have appre-

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hended it would be. From the record here it is apparent that he took no steps to relieve himself from the effects of this wrongful judgment, if it be wrongful, until the 3d day of July following, when an affidavit was made by his attorney for the writ of *certiorari* from this Court. It may have been supposed by the attorneys for the defendant that this practice would be allowed from the fact that the writs were not dismissed in the two cases before cited. For that reason no costs will be allowed, though the writ will be dismissed.

MORSE and MCGRATH, JJ., concurred. CHAMPLIN, C. J., and GRANT, J., did not sit.

JAMES WHITE, COMMISSIONER OF HIGHWAYS, FOR THE USE AND BENEFIT OF WILLIAM EMERY, v. JONATHAN BOYCE.

Certiorari.

This case is ruled by *White v. Boyce, ante*, 349.

Certiorari to review proceedings in justice's court. Argued October 27, 1891. Writ dismissed November 13, 1891. The facts are stated in *White v. Boyce, ante*, 349.

Burritt & Canfield, for defendant, and petitioner in *certiorari*.

H. H. Woodruff, for plaintiff, and respondent in *certiorari*.

LONG, J. The facts in this case are substantially as

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stated in *White v. Boyce, ante,* 349. Emery claims to have been injured by the same means that Cottonham, in that suit, claimed to have been injured. Boyce was personally served with the summons by which the suit was commenced in justice's court, appeared, and adjourned the suit, and, after judgment there, procured the writ of *certiorari* from this Court directed to the justice's court.

The writ must be dismissed, under the ruling in the former case, but no costs will be awarded.

MORSE and MCGRATH, JJ., concurred. CHAMPLIN, C. J., and GRANT, J., did not sit.

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HENRY BOLTON AND DONALD MCRAE v. CHARLES NITZ, AUGUST ZIEM, AND JOHN BECK.

[See 71 Mich. 388; 80 Id. 470.]

Replevin—Amendment of writ—Liability of sureties on bond.

The amendment of a writ of replevin, after the execution of the statutory bond, by which other property is inserted in the writ without the knowledge or consent of the sureties, by stipulation of the respective parties, discharges the sureties from liability, unless it is made to appear in the suit upon the bond that the amendment, which is followed in the declaration, made no change in their liability.

So *held*, where the writ originally called for 130,000 feet of white pine and Norway pine saw-logs, of specified lengths, then in a certain stream, describing it, being *all* the white pine and Norway pine saw-logs taken by the defendants, and claimed to have been cut by Charles Nitz, during the winter of 1885 and 1886, from off two described 40-acre tracts of land; and after the execution of the bond the writ was amended by stipulation of the parties by changing the description of one

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of the 40-acre lots, and the declaration followed the amended description. Defandants recovered judgment for the value of the property, and in a suit upon the bond the sureties showed that the judgment was for the value of logs cut from the 40 acres introduced into the writ by amendment, which testimony was taken from the jury, and a verdict directed in favor of the plaintiffs for the amount of the judgment recovered in the replevin suit, in which action the court is held to have erred.

Error to Alpena. (Simpson, J., presiding.) Argued October 30, 1891. Decided November 13, 1891.

Debt. Defendants bring error. Reversed. The facts are stated in the opinion.

Turnbull & Dafoe, for appellants.

W. E. Depew, for plaintiffs.

CHAMPLIN, C. J. This is an action of debt brought upon a replevin bond.

On April 2, 1886, Charles Nitz sued out of the circuit court for the county of Alpena a writ of replevin to recover possession of certain goods, described therein as follows:

"One hundred and thirty thousand feet of white pine and Norway pine saw-logs, some of which are 12, some 14, some 16, and some 18 feet long, and now being in a certain stream commonly called the 'Narrows,' a tributary of Long lake, in said county of Alpena; being all the white pine and Norway pine saw-logs taken by said defendants hereinafter named, and claimed by them to have been cut by Charles Nitz, during the winter of 1885 and 1886, from off the S. W. ¼ of S. E. ¼ and the N. E. ¼ of N. W. ¼, of section twenty-five (25), town thirty-two (32) north, of range eight (8) east, State of Michigan."

Before such writ was served, an affidavit was made by Nitz, and subscribed to by him on the 2d day of April, 1886, which was annexed to the writ before service. The

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sheriff returned that he seized the property on the 3d day of April, 1886, as commanded in his writ, and had it appraised; and, upon such appraisal being made, the plaintiff in that suit, Nitz, as principal, and August W. Ziem and John Beck, as sureties, executed the bond required by the statute in the penal sum of $1,300, which bond bears date the 6th day of April, 1886, and in which the property replevied is described in the same language as that contained in the writ of replevin. This bond was delivered to the sheriff, and the property turned over to Nitz, the plaintiff. Afterwards, and before the declaration in the suit was filed, the attorneys for the respective parties to that suit entered into a stipulation bearing date the 16th day of April, 1886, in which it was stipulated that—

"The affidavit for and the writ of replevin be considered amended, and the same are hereby amended, by substituting the words, the 'north-east' instead of the words the 'south-east,' so that the first description therein shall read as follows: 'The south-west quarter of the north-east quarter,' etc."

Thereafter the plaintiff filed his declaration in the suit, in which he described the property as follows:

"One hundred and thirty thousand feet of white pine and Norway pine saw-logs, some of which are 12 feet, some 14 feet, some 16 feet, and some 18 feet long, located at the time of replevin on a certain stream commonly called the 'Narrows,' a tributary of Long lake, in said county of Alpena; being all the white pine and Norway pine saw-logs taken by said defendants hereinbefore named, and claimed by them to have been cut by Charles Nitz, during the winter of 1885 and '6, from off the S. W. ¼ of the N. E. ¼, and the N. E. ¼ of the N. W. ¼, of section 25, town 32 north, of range 8 east, State of Michigan."

Issue was framed upon that declaration, and the cause has been tried, and resulted in a judgment in favor of the defendants, who, instead of taking a return of the

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property, took judgment for its value. Execution was issued, and returned unsatisfied, against the plaintiff in the replevin suit, and this suit is brought to recover the damages and costs upon the bond given to the sheriff, which has been duly assigned to the plaintiffs in this action.

The defendants introduced testimony tending to show that the judgment recovered was for the value of logs which were cut from the S. W. ¼ of the N. E. ¼ of section 25, mentioned in the declaration; and counsel for defendant sureties in the replevin bond claim that, after the bond was executed and delivered, a material alteration was made in the declaration in the replevin case, by which the liabilities of the sureties were enlarged, and they made liable for the value of logs which were not included in the description of the property contained in the bond, and that they are therefore discharged from liability. The circuit judge permitted this testimony to be given in the first instance, but afterwards struck it out of the case as irrelevant and immaterial, and directed the jury to render a verdict for the plaintiffs for the amount of the judgment recovered in the replevin suit and the costs, which they did; and the question now is whether the amendment made to the declaration was such a material change in the contract of the sureties as operated to discharge them from liability. If it was, the court erred in striking out the testimony; if not, there is no error in the record.

The logs replevied are not described as containing any marks by which they could be identified. One white pine or Norway pine saw-log has much the same appearance as any other white pine or Norway pine saw-log of similar dimensions; and, where property is thus of a kind which answers to a general description, the description contained in the writ is often aided by a reference to

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some other fact by which it may be identified. *Wattles v. Dubois*, 67 Mich. 313. It may have been necessary to make this description thus specific in order to identify the logs in the "Narrows" from any other logs which the defendants may have had in the stream, and which had been cut from other lands than those described, and to which the plaintiff made no claim. The fact that the parties amended the description by stipulation in the written affidavit as to the particular tract of land from which the logs were cut shows that the parties themselves regarded it as a material portion of the description of the property; and so we think it was. Being so, any alteration by which other property was inserted in the writ of replevin, after the execution of the bond, without the knowledge and consent of the sureties, and with the consent of the defendants in the replevin suit, would discharge them from liability upon the bond. *Coman v. Thompson*, 43 Mich. 389; *Bullock v. Taylor*, 39 Id. 137; *Michie v. Ellair*, 60 Id. 73; *Evers v. Sager*, 28 Id. 47; *People v. Brown*, 2 Doug. 9; *Fish v. Barbour*, 43 Mich. 19. In the case last cited an affidavit was made upon which a *capias* issued, and the principal defendant was arrested. He gave bail to the sheriff, and afterwards, upon filing the declaration, the plaintiff saw fit to enlarge the grounds of action against the principal defendant, and recovered a judgment, and the Court held that the sureties were discharged; the Court saying:

"The bail never agreed to indemnify plaintiff against the charges set out in the second declaration. There can be no presumption that recovery was not based on the new averments, which are not only material, but descriptive. We think it is impossible to lawfully hold them liable upon the judgment."

In this case the testimony introduced, and afterwards stricken out, showed that the judgment recovered was for damages on account of the logs which were intro-

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duced into the declaration by amendment after the giving of the bond. We think that no recovery could be had upon the bond unless it was made to appear that no change in the liability of the sureties was made by the amendment inserted in the declaration. See *Elliott v. Hart*, 45 Mich. 234.

The judgment must be reversed, and a new trial granted.

The other Justices concurred.

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WILLARD J. TURNER, PROSECUTING ATTORNEY OF MUSKEGON COUNTY, v. ALBERT DICKERMAN, CIRCUIT JUDGE OF MUSKEGON COUNTY.

Criminal law—Information—Assault with intent to do great bodily harm—Conviction of assault and battery.

A respondent cannot be convicted of assault and battery under an information charging him with the statutory offense of "assault with intent to do great bodily harm less than the crime of murder," but not charging a battery; nor can the information be amended, after verdict and before judgment, so as to include such latter charge.

Mandamus. Submitted November 5, 1891. Writ denied November 13, 1891.

Relator applied for *mandamus* to compel respondent to vacate an order arresting judgment and discharging a prisoner, and to proceed to judgment. The facts are stated in the opinion.

Willard J. Turner, in *pro. per.*

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Jones & Clark, for respondent.

PER CURIAM. Augusta Linderman was arrested upon a complaint and warrant charging her with an assault with intent to do great bodily harm, less than the crime of murder, upon August Linderman.

Upon the examination before a justice the testimony showed that she had committed the offense of assault and battery. She was bound over by the justice upon the charge for which she was arrested, and later an information was filed in the circuit court charging her with committing an assault with intent to do great bodily harm, less than the crime of murder, upon August Linderman. A trial was had upon this charge, and the jury found a verdict of guilty of assault and battery. The counsel for respondent moved for an arrest of judgment, alleging, among other reasons, that the information did not charge a battery. The prosecuting attorney also moved to amend the information by inserting in the appropriate place the words: "And him, the said August Linderman, did beat, wound, and ill treat." The court, without passing upon the motion to amend, overruled the motion to arrest judgment, but before proceeding to judgment, and after further consideration, set aside and vacated the order denying the motion to arrest judgment, and granted the motion, arrested the judgment, and discharged the prisoner. Now the prosecuting attorney applies to this Court for a writ of *mandamus* to compel the circuit judge to vacate the order arresting judgment and discharging the prisoner, and proceed to judgment upon the verdict.

The circuit judge was right. The offense for which the respondent was tried is a statutory offense, and does not include the lesser one of battery. There is no charge in the information of the respondent having committed

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a battery, and no one can be convicted of an offense which is not charged in the information, where the elements of the offense are not embraced in some greater offense charged. 1 Bish. Crim. Law, §§ 798, 803; *Hanna v. People*, 19 Mich. 322; *People v. McDonald*, 9 Id. 153; *Young v. People*, 6 Bradw. (Ill.) 434; *State v. McDevitt*, 69 Iowa, 553 (29 N. W. Rep. 461); *State v. McAvoy*, 73 Id. 557 (35 N. W. Rep. 631).

It is plain that the information could not be amended so as to include the offense for which the jury convicted the respondent. The statute allows certain amendments to be made before the jury are sworn, and also others enumerated, after verdict; but an amendment of this nature is not one which the statute permits.

The writ must be denied.

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SPOONER R. HOWELL v. ALBERT DICKERMAN, CIRCUIT JUDGE OF MUSKEGON COUNTY.

Attachment—Debt not due—Sufficiency of affidavit.

1. Act No. 149, Laws of 1889 (3 How. Stat. § 8016*a*), authorizing the issuance of a writ of attachment before the maturity of the debt, is construed as follows:

a—The plaintiff must show reasons for the immediate issuance of the writ, which showing must consist of *facts* within the knowledge of the affiant, and not of mere *conclusions* of fact.

b—The reason for the issuance of the writ must be shown by facts and circumstances so given in detail as to enable the circuit judge to satisfy himself from such facts and circumstances that the writ ought to issue.

c—It will not do for the affiant simply to swear that he *knows* that the defendant has assigned, disposed of, or concealed his property with intent to defraud his creditors, but

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the *facts* attending such disposition or concealment of the property must be set forth, and its relative value to that of the remainder of the property owned by the debtor, so that the circuit judge may know something about it as well as the affiant.

d—The fact that other creditors have levied upon a portion of the debtor's property, or that he has not sufficient property to pay his debts, will not warrant the issuance of the writ; and the allegation that the plaintiff will lose his debt if the writ is not issued before the debt becomes due is an inference or conclusion of fact for the circuit judge to draw, and not the plaintiff, from the other facts and circumstances set out in the affidavit.

2. The Court decline to pass upon the question of the constitutionality of the act, in view of the limited argument allowed in *mandamus* cases on motion-day.

Mandamus. Submitted November 5, 1891. Writ granted November 13, 1891.

Relator applied for *mandamus* to compel respondent to quash a writ of attachment. The facts are stated in the opinion.

Bunker & Carpenter (*Fletcher & Wanty*, of counsel), for relator.

Sessions, Soper & Bassett (*FitzGerald & Barry*, of counsel), for respondent.

PER CURIAM. This is an application for *mandamus* to compel respondent to quash a writ of attachment issued out of the Muskegon circuit court at the suit of D. Victor Webster, plaintiff, against Spooner R. Howell, "doing business under the name and style of S. R. Howell & Co."

It is claimed—

1. That the affidavit for the writ is jurisdictionally defective.

2. That the affidavit shows that the defendant was not a debtor of the plaintiff in said writ at the time the suit was commenced.

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3. That the act under which the suit is brought (Act No. 149, Laws of 1889) is unconstitutional and void.

The affidavit for the writ in full is as follows:

"STATE OF MICHIGAN, } ss.
County of Muskegon. }

"Granger Farwell, of the city of Chicago, county of Cook, and state of Illinois, being duly sworn, deposes and says that he is the agent of, and is authorized to and does make this affidavit for and in behalf of, D. Victor Webster, the plaintiff named in the annexed writ of attachment.

"That Spooner R. Howell, doing business under the name and style of S. R. Howell & Co., the defendant named in said writ of attachment, is justly indebted to the said plaintiff, D. Victor Webster, in the sum of forty-three thousand five hundred ninety-three and sixty-six hundredths dollars ($43,593.66), as near as may be, over and above all legal set-offs, and upon express contract; that the same is not due, and that the same will become due as follows: That two thousand five hundred eight and thirty one-hundredths dollars ($2,508.30) thereof will become due on the 22d day of July, A. D. 1891; that nineteen hundred eighty and forty one-hundredths dollars ($1,980.40) thereof will become due on the 31st day of July, A. D. 1891; that twenty-one hundred ninety-three and eighty-seven one-hundredths dollars ($2,193.87) thereof will become due on the 4th day of August, A. D. 1891; that five thousand dollars ($5,000) thereof will become due on the 7th day of August, A. D. 1891; that three thousand two hundred twenty-three and eighteen hundredths dollars ($3,223.18) thereof will become due on the 8th day of August, A. D. 1891; that two thousand three hundred eighteen and thirty-nine hundredths dollars ($2,318.39) thereof will become due on the 10th day of August, A. D. 1891; that two thousand two hundred sixty-one and eighty-five hundredths dollars ($2,261.85) thereof will become due on the 10th day of August, A. D. 1891; that eighteen hundred eighty-three and twenty-nine hundredths dollars ($1,883.29) thereof will become due on the 12th day of August, A. D. 1891; that two thousand two-hundred fifty-four and eleven hundredths dollars ($2,254.11) thereof will become due on the 12th day of August, A. D. 1891; that twenty-one hundred seven and sixteen hundredths dollars ($2,107.16) thereof will become due on the 14th day of August, A. D. 1891; that two thousand eight hundred sixty-two and fifty-four hundredths dollars ($2,862.54) thereof will become due on the 18th day of August, A. D. 1891; that two thousand six hundred forty-three and eighteen hundredths dollars ($2,643.18) thereof will become due on the 22d day of August, A. D. 1891; that two thousand six hundred nineteen and three hundredths dollars ($2,619.03) thereof

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will become due on the 27th day of August, A. D. 1891; that two thousand seven hundred forty-one and thirteen hundredths dollars ($2,741.13) thereof will become due on the 2d day of September, A. D. 1891; that two thousand eight hundred forty-two and twelve hundredths dollars ($2,842.12) thereof will become due on the 16th day of September, A. D. 1891; that four thousand one hundred fifty-five and eleven hundredths dollars ($4,155.11) thereof will become due on the 28th day of September, A. D. 1891.

"And this deponent further says that he knows that the said Spooner R. Howell, as such S. R. Howell & Co., as aforesaid, has assigned, disposed of, and concealed his property with intent to defraud his creditors.

"And deponent further says that he has good reason to believe, and does believe, that the said Spooner R. Howell, as such S. R. Howell & Co., as aforesaid, is about to assign, dispose of, and conceal his property with intent to defraud his creditors.

"And this deponent further says that he knows that the said defendant, Spooner R. Howell, is not a resident of this State, and has not resided therein for three months immediately preceding the time of making this affidavit.

"And this deponent further says that he knows that the said Spooner R. Howell, as such S. R. Howell & Co., on the 14th day of July, A. D. 1891, transferred to the First National Bank of Chicago a very large amount of property, and consisting of his entire ownings in the city of Chicago and in the state of Nebraska.

"And this deponent further says that he knows that the said Spooner R. Howell is in failing circumstances, and that the liabilities and just debts owing by him will far exceed in amount the property owned by him.

"And this deponent further says that attachments aggregating many thousand dollars have been issued out of this court, and have been levied upon property in the county of Muskegon belonging to the said Spooner R. Howell as aforesaid.

"And deponent further says that the said plaintiff, D. Victor Webster, will lose the entire amount of his debt or claim against the said Spooner R. Howell unless a writ of attachment be issued out of this court, and be proceeded with against the goods and chattels, money and effects, lands and tenements, of the said defendant, Spooner R. Howell, as such S. R. Howell & Co., in favor of the said plaintiff, D. Victor Webster.

"And this deponent further says that all of the indebtedness mentioned in this affidavit is owing upon a promissory note made by Western Mercantile Co., indorsed and guaranteed by said Spooner R. Howell, as such S. R. Howell & Co., and also upon certain drafts and acceptances made in part by Howell, Jewett & Co., and indorsed and guaranteed by said Spooner R. Howell, as

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such S. R. Howell & Co., and in part made by said Spooner R. Howell, as such S. R. Howell & Co., and indorsed and guaranteed by said Spooner R. Howell, as such S. R. Howell & Co.; and further deponent says not."

We think the affidavit defective. We said in *Newman v. Kent Circuit Judge*,[1] that the "analogies of practice in cases under the fraudulent debtors' act and in injunction cases are applicable to proceedings under this statute." We did not pass upon the constitutionality of the statute at that time, as the writ was dismissed for want of a proper affidavit. The statute[2] is an amendment to the chapter relating to proceedings against debtors in attachment, and is as follows:

"SEC. 32. Whenever the plaintiff shall be entitled to a writ of attachment by virtue of sections one and two of this act, except that the debt owing to him by the debtor is not due, he may begin and prosecute his suit by attachment, by complying with the provisions of this act: *Provided*, however, that, before any such writ of attachment shall issue, the plaintiff, or some person in his behalf, shall make an affidavit, in compliance with section two of this act, except that, instead of stating such indebtedness is due, such affidavit shall state when the same will become due, and show reasons for the immediate issuance of said writ to the satisfaction of a circuit judge, and obtain his order indorsed on such affidavit that such writ may issue and be proceeded with; and no other or further affidavit shall be required; and said lien so created shall continue until the final decision in said cause, unless otherwise discharged: *Provided*, further, no judgment shall be taken upon such indebtedness until the same shall have matured by the terms thereof."

The plaintiff must "show reasons for the immediate issuance of the writ." Such showing must consist of facts within the knowledge of the affiant, and not mere conclusions of fact. The affidavit of exigency in this

[1] This was a *mandamus* case, in which no opinion was filed, decided January 28, 1890.

[2] Act No. 149, Laws of 1889 (3 How. Stat. § 8016*a*.)

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case, if it should be considered as embracing all the allegations in the affidavit, shows—

1. That affiant knows that Howell has assigned, disposed of, and concealed his property with intent to defraud his creditors.
2. That affiant is informed and believes that he is about to do the same thing.
3. That he knows Howell is a non-resident of the State, and has not resided therein for three months immediately preceding the making of the affidavit.
4. That he knows that Howell on July 14, 1891, transferred to the First National Bank of Chicago a very large amount of property, consisting of his entire ownings in the city of Chicago and state of Nebraska.
5. That he knows that Howell is in failing circumstances, and that the liabilities and just debts owing by him will far exceed in amount the property owned by him.
6. That attachments aggregating many thousand dollars have been issued out of the Muskegon circuit court, and levied upon property in Muskegon county, belonging to said Howell.
7. That the plaintiff, said D. Victor Webster, will lose the entire amount of his debt against said Howell unless the writ is issued.

Not a single fact is given in detail, but everything is sworn to in general terms. It is not stated what property, or how much of his property, he has assigned, disposed of, or concealed, or in what manner he has done so, with intent to defraud his creditors. The second allegation cannot be considered, as it is on belief. It is not stated whether he has any property outside of Chicago, Nebraska, and Muskegon county; nor how much he disposed of in the two former places; nor that it was disposed of without good consideration, or with intent to defraud his creditors. For aught that appears in the affidavit, he may have had plenty of assets in other places, which might be reached by process after these debts, or some of them, became due. The value of the

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property levied upon in Muskegon is not stated, or that all of it has been so levied upon, or will be by other creditors in case the writ is not issued before plaintiff's claim is due. All that the court can gather from such an affidavit is that the affiant knows the general allegations therein set forth, without the statement of any facts or circumstances upon which his knowledge is based.

The affidavit would have been sufficient to obtain a writ of attachment if the debt had been due; but, in order to avail himself of the most extraordinary remedy given by this statute, the reason for its issue must be shown by facts and circumstances so given in detail that the circuit judge can satisfy himself from such facts and circumstances that the writ ought to issue. It will not do for the affiant simply to swear that he knows that the defendant in the suit has assigned, disposed of, or concealed his property with intent to defraud his creditors. The facts attending such disposition or concealment of the property must be set forth, and its relation as to value to the remainder of the property owned by the debtor, so that the court may know something about it as well as the affiant.

The property in Chicago and Nebraska may have been transferred in payment of just debts, or as security for such payment. If so, such transfer would be no ground for an attachment, even if the debts were due. The fact that property in Muskegon had been levied upon by other creditors is no ground for the plaintiff's attachment. The fact that Howell had not property enough to pay his debts would not warrant an attachment. The allegation that the plaintiff will lose his debt if the writ is not issued before such debt becomes due is an inference or conclusion of fact for the court

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to draw, and not the plaintiff, from the other facts and circumstances set out in the affidavit.

We are not inclined to point out any further than we may have already done what an affidavit, under this statute, should contain in order to be effectual to procure a writ. Suffice it to say that the affidavit before us is barren of any substantial reasons for the issue of a writ of attachment before the debt has become due, and that, if such an affidavit should be held sufficient, it would be comparatively as easy to obtain an attachment before the debt was due as afterwards, and the creditor would have the debtor at his mercy at any time after the debt was made, though by his contract for a good consideration he had solemnly agreed that the debt need not be paid or the debtor harassed until the expiration of a fixed period.

We do not think it desirable to pass upon the constitutionality of the statute, considering the limited argument allowed in *mandamus* cases upon motion-day. It is a grave question, demanding more time for the presentation of the views of counsel and the consideration of the Court than is at hand upon this motion.

The writ of attachment must be quashed for the reasons stated, with costs to defendant, and the circuit judge is so advised and commanded.

Mandamus will issue as prayed.

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SPOONER R. HOWELL v. ALBERT DICKERMAN, CIRCUIT JUDGE OF MUSKEGON COUNTY.

[See *ante*, 361.]

Attachment—Debt not due—Allowance of writ.

Before the clerk is authorized to issue a writ of attachment under Act No. 149, Laws of 1889 (3 How. Stat. § 8016*a*), the statutory affidavit must be presented to him, with the order of allowance of the circuit judge indorsed thereon.

Mandamus. Submitted November 5, 1891. Writ granted November 13, 1891.

Relator applied for *mandamus* to compel respondent to quash a writ of attachment. The facts are stated in the opinion, and in *Howell v. Muskegon Circuit Judge, ante*, 361.

Bunker & Carpenter (*Fletcher & Wanty*, of counsel), for relator.

Sessions, Soper & Bassett (*FitzGerald & Barry*, of counsel), for respondent.

PER CURIAM. Application for *mandamus* to compel respondent to quash a writ of attachment issued out of the Muskegon circuit court at the suit of John Torrent, plaintiff, against Spooner R. Howell, "doing business under the name and style of S. R. Howell & Co."

The writ of *mandamus* must issue in the case, for reasons stated in *Howell v. Muskegon Circuit Judge, ante*, 361, and also for this additional reason: The statute provides that the writ of attachment shall not issue until

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the plaintiff, or some one in his behalf, shall have made an affidavit "showing reasons for the immediate issuance of said writ, to the satisfaction of a circuit judge," and obtained his order indorsed on such affidavit that such writ may issue and be proceeded with. The order in this case was indorsed upon the writ, and not upon the affidavit. It appears that the affidavit was attached to the writ when it was presented to the circuit judge, and he indorsed his order upon the writ instead of the affidavit; and the deputy-clerk makes affidavit that he issued the writ as a matter of course, as in other cases, and that the order that now appears indorsed upon the writ was not presented or shown to him, nor did he issue the writ in pursuance of said order. The attorney who procured the writ makes affidavit that the writ was prepared in his office, and the affidavit attached before it was presented to the circuit judge for indorsement, and after such indorsement was presented to the deputy-clerk, who thereupon signed and sealed the writ; but he does not know whether or not said deputy-clerk read such indorsement.

This is a matter we cannot determine upon affidavits. The order is required by the statute to be indorsed upon the affidavit, and the evident intention of the law is that the writ shall not issue until the affidavit, properly indorsed by the circuit judge, shall be presented to the clerk.

As the affidavit in this case has not such indorsement, the writ was improvidently issued, and is void.

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HORATIO G. JONES v. THE BOARD OF EDUCATION OF THE CITY OF DETROIT.

Schools—Adoption of text-books—Reconsideration of resolution.

1. An averment in a petition for *mandamus* not expressly denied, but admitted to be true in part, in the answer, will be taken as true.
2. Act No. 165, Laws of 1887 (3 How. Stat. § 5067), prohibiting a change of text-books adopted by a school board under its provisions within five years, except by the consent of a majority of the qualified voters of the district present at an annual meeting, or a special meeting called for that purpose, applies to city schools organized under a special charter which does not provide for such annual meeting.
3. A *mandamus* is granted in this case to compel the board of education of the city of Detroit to rescind a resolution reconsidering one passed at a former meeting adopting a text-book for use in place of one which had been in use for upwards of five years, and making a different selection; it appearing that in the interim the publishers of the book first adopted, and the patrons of the school, had acted in reliance upon the rescinded resolution in the sale and purchase of books.
4. The *power* to adopt text-books is conferred by law, and cannot be affected by any rule of the board fixing a time for the reconsideration of motions and resolutions.

Mandamus. Submitted November 5, 1891. Granted November 13, 1891.

Relator applied for *mandamus* to compel respondent to rescind its action in adopting a certain text-book for use in the public schools. The facts are stated in the opinion.

W. M. Lillibridge (*Edwin F. Conely*, of counsel), for relator.

W. E. Baubie (*F. A. Baker*, of counsel), for respondent.

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PER CURIAM. At a regular meeting of the board of education of the city of Detroit, held August 27, 1891, by a resolution duly passed, it adopted Reed's Word Lessons for use in the public schools in the city, the book formerly used having been in use upwards of five years. The schools were to open September 7. The pub-publishers of different books had made their propositions to the board for the introduction of their books into the schools. These propositions had been referred to a committee, who presented majority and minority reports at the meeting on the 27th. The board adjourned without any motion to reconsider. On August 29 a majority of the members of the board filed with its secretary a written notice that at the next regular meeting they would move to reconsider the vote by which this book was adopted. This meeting was held September 10, at which time the resolution was defeated, and another book adopted in its place. On September 2 the president of the board notified the publishers of Reed's Word Lessons that their proposition was accepted, and the book adopted. On the same date the superintendent of schools notified said publishers to forward to him the copies which they had proposed to furnish for teachers' desks and indigent pupils. The relator, a resident tax-payer of the city, had meanwhile purchased a book for his child. The petition alleges that about 10,000 copies had been forwarded to the superintendent, and about 6,000 copies sold to the pupils of the schools. Respondent admits that before the 10th day of September, 1891, a number of copies of said book were sold to pupils, but as to the exact number it is not informed. The averment in the petition must be taken as true, since it is not expressly denied by the answer, but is admitted to be true in part.

In 1887 (by Act No. 165) the primary school law was

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amended, and, after providing for the selection and adoption of school-books by school boards, it (section 15) reads as follows:

"Each school board making a selection of text-books under the provisions of this act shall make a record thereof in their proceedings, and text-books once adopted under the provisions of this act shall not be changed within five years, except by the consent of a majority of the qualified voters of the district present at an annual meeting, or at a special meeting called for that purpose. * * * *This act shall apply to all schools in the State, including schools in cities or villages, whether incorporated under special charter or under the general laws.*"

1. It is insisted by respondent that the above provision does not apply to the schools of the city of Detroit, because they are organized under a special act, in which no provision is made for an annual meeting of the qualified voters. The respondent exists under an act entitled "An act relative to free schools in the city of Detroit," approved February 24, 1869. Section 8 of that act confers upon the board—

"Full power and authority to make by-laws and ordinances * * * relative to regulation of schools, and the books to be used therein."

No plainer words could have been used to express the intention of the Legislature than those of the last clause of section 15, above quoted. By its express terms, no school is exempt from its provisions. This Court cannot legislate into the act a different meaning from one so clearly expressed. The evil to be avoided has been as prevalent in the schools of the cities as in those of the country. The fact that no provision is made in the act under which respondent is organized for an annual meeting of the voters furnishes no pretext for holding that the Legislature did not intend the provisions of section 15 to apply to city schools organized under special acts.

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2. The respondent provided by rule that a motion to reconsider shall be in order only at the same or first subsequent meeting, and no resolution shall be acted upon at the meeting at which it is introduced, if objected to by any member, but shall lie upon the table, to be taken up as unfinished business at the next or any subsequent meeting. As above shown, action was taken, and the board adjourned. The publishers of the book adopted, and the patrons of the school, had acted upon it. We think, under these circumstances, that the board had no power to reconsider its action. The power to adopt textbooks is conferred by the law, and cannot be affected by any rule of the board fixing a time for the reconsideration of motions and resolutions. *State v. Board of Education*, 35 Ohio St. 368; *State v. State Board of Education*, 18 Nev. 173 (1 Pac. Rep. 844). We have not before us a case where the motion to reconsider was carried before the publishers and patrons of the schools had acted upon the faith of the resolution originally adopted, and upon that we express no opinion.

The writ must issue as prayed.

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CLARENCE E. CLEVELAND v. EDWIN M. AMY, ASSESSOR OF SCHOOL-DISTRICT NO. 8 OF THE TOWNSHIP OF TEKONSHA.

Schools and school-districts—Contract with teacher—Election of officers.

1. The district board of a primary school-district has power to contract with a qualified teacher for such term during the ensu-

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ing year as shall be determined by the qualified voters of the district at the annual school meeting thereafter to be held.[1]

2. The term "all other school officers," as used in Act No. 18, Laws of 1885 (3 How. Stat. § 5132), which provides "that in the election of trustees, and *all other school officers*, the person receiving a *majority* of all the votes shall be declared elected," includes the director, moderator, and assessor of primary school-districts.

3. The power to employ teachers conferred by How. Stat. § 5065, upon the district boards of primary schools, is co-extensive with that conferred by How. Stat. § 5134, upon the boards of trustees of graded schools.

Mandamus. Submitted November 5, 1891. Granted November 13, 1891.

Relator applied for *mandamus* to compel respondent to pay an order for teacher's wages. The facts are stated in the opinion.

John C. Patterson, for relator.

A. A. Ellis, Attorney General, and *H. E. Winsor*, for respondent.

PER CURIAM. Relator is a school-teacher, and on the 31st day of August, 1891, entered into a written contract with Daniel B. Sanders, P. H. Doyle, and the respondent, who then constituted the district board, to teach the school in said district, commencing on September 7, during the term to be voted by the district at the annual meeting. An order was duly issued by Mr. Doyle as moderator, and Mr. Sanders as director, drawn upon

[1] How. Stat. § 5052, subd. 11, authorizes the qualified electors of a primary school-district, at the first and annual meetings *only*, to determine the length of time a school shall be taught in the district during the ensuing year, which time is graded according to the number of children of school age in the district, but cannot be for less than three months. In case the voters fail to make such determination, the district board is required to perform that duty; and, if the district fails to vote for at least the minimum length required, the board must make provision for such minimum length of school.

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respondent as assessor, for the payment to relator of a certain sum due him as wages. The assessor declined to pay, and relator petitions for a writ of *mandamus* to compel such payment.

Two reasons are given for the refusal to pay the order:

1. That the contract with the relator was made with the old board, and they had no authority to contract for the year after the terms of two of the board would expire.

2. That at the annual election held in September one D. E. Chipman was elected director and one W. B. Durham was elected moderator; that they duly qualified; and, therefore, that Sanders and Doyle were not members of the board, and had no authority to act.

1. The difficulty in securing competent teachers, if school boards were obliged to wait until the annual meeting in September, is apparent. It is exemplified in this case, where the relator had taught in this school for two years, and could not wait for the annual meeting, as he had other opportunities offered him. There is usually no change in the majority of the board, as only one officer is elected annually. The term of Sanders expired by limitation, and Doyle had been appointed to fill a vacancy. The question would hardly arise, except under circumstances like the present.

It was decided in *Tappan v. School-district*, 44 Mich. 500, that the trustees of graded public schools can make binding contracts for teaching before the year opens. The reasoning in that case applies with equal force to the present one. The power to employ teachers conferred by statute upon the district boards of primary schools is co-extensive with that conferred upon the boards of trustees of graded schools. In the former case the law reads:

"The district board shall hire and contract with such duly qualified teachers as may be required." How. Stat. § 5065.

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In the latter case the law reads:

"It shall be the duty of the board of trustees * * * to employ all qualified teachers necessary for the several schools." How. Stat. § 5134.

No power is now conferred by statute upon the voters at an annual meeting to determine whether the school should be kept by a male or female teacher, as was the case when *Tappan v. School-district* was decided. In the case of graded schools, one-third of the trustees go out yearly, and the same is true of the officers of the primary school-districts. The old board, therefore, had power to make the contract for the ensuing year for such term as should be voted at the annual meeting.

2. It was decided in *Conrad v. Stone*, 78 Mich. 635, that, in the absence of any statutory provision expressly requiring more, a plurality of votes cast will elect. The Legislature enacted in 1883 that in the election of all school officers the person receiving the highest number of votes should be declared elected. Act No. 28, Laws of 1883. This act was an amendment to the general school law. How. Stat. § 5132. This section was again amended in 1885, and provides—

"That in the election of trustees, and all other school officers, the person receiving a majority of all the votes shall be declared elected."

The term "all other school officers" must be held to mean the moderator, director, and assessor, who comprise the board of the primary school-district. There are none others to whom it could refer. The trustees are the only officers to be elected in graded school-districts. This section was one of "An act to revise and consolidate the laws relating to public instruction and primary schools, and to repeal all statutes and acts contravening the provisions of this act," and the amendment included all officers to be elected under its provisions. Chipman and

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Durham did not receive a majority of all the votes cast. There was therefore no election, and the old officers held over.

A writ of *mandamus* will issue as prayed.

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ALLAN CALDWELL, TREASURER OF THE TOWNSHIP OF OLIVER, v. DAVID WARD AND HENRY C. WARD.

[See 88 Mich. 13.]

Taxes—Injunction to restrain waste—Right to maintain bill.

Act No. 223, Laws of 1889 (How. Stat. § 1170 *n* 1), authorizing the issuance of injunctions at the suit of township treasurers to restrain waste upon lands on which taxes are due and remain unpaid, is construed as follows:

a—A bill may be filed under the statute upon a *refusal* of payment at any time after the taxes can be lawfully demanded, although the treasurer has not returned his tax roll.

b—In order to warrant the filing of a bill before the expiration of the time within which the taxes can be paid to the township treasurer, there must have been a positive, unequivocal refusal to pay the whole or some portion of the same.

Appeal from Kalkaska. (Aldrich, J.) Argued November 6, 1891. Decided November 13, 1891.

Bill to restrain waste upon lands upon which taxes are unpaid, under Act No. 223, Laws of 1889. Complainant appeals from decree dismissing bill. Affirmed. The facts are stated in the opinion.

Chauncey C. Jencks, for complainant.

H. H. Wheeler, W. D. Totten, C. M. Phelps, and *H. T. Cook,* for defendants.

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MORSE, J. Complainant, as treasurer of the township of Oliver, filed his bill of complaint in the circuit court for the county of Kalkaska, in chancery, pursuant to the provisions of Act No. 223, Laws of 1889,[1] for an injunction to restrain the cutting or removing of timber from the lands of defendant David Ward in the said township of Oliver. A preliminary injunction was allowed, issued, and served, but the operation thereof was soon after suspended upon the filing of the defendants' bond, conditioned for the faithful performance of any order or decree of the court, etc. Defendants demurred generally to the bill of complaint, and in the circuit court the demurrer was sustained; but the order dismissing the bill was reversed in this Court, and the case remanded back for further proceedings. See *Caldwell v. Ward*, 83 Mich. 13. Defendants then answered severally.

By their answers, and by the terms of a stipulation between counsel at the hearing, all of the material allegations contained in the bill of complaint were admitted, excepting only the allegations as to the efforts made by the treasurer to collect the taxes, as set forth in the second paragraph of the bill. The answers alleged as a part of the defense that the time for the collection of taxes in the township of Oliver had been duly extended by the township board of that township to the 1st of March, and that the tax roll, with its warrant, was still in the treasurer's hands, by virtue of such extension of

[1] Act No. 223, Laws of 1889, provides: "That when any person, company, or corporation shall neglect or refuse to pay any tax assessed on the lands of such person, company, or corporation within the time specified by law, the township treasurer shall be entitled to an injunction to restrain waste on any of such lands upon which the taxes shall remain unpaid, when it shall appear that such lands are chiefly valuable for the timber being, standing, or growing thereon. And any circuit judge or circuit court commissioner of the county in which such lands are situated may, on the application of such township treasurer, make an order restraining any person from committing waste thereon."

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time, at the time the bill of complaint was filed. This fact was admitted by complainant's counsel in the stipulation above referred to. No material fact was, therefore, in controversy at the hearing, and the only matter upon which proofs were taken was as to the efforts made by the treasurer to collect the defendant David Ward's taxes.

The defendants contend that the case is controlled by the opinion of Mr. Justice GRANT when it was in this Court on demurrer. In the opinion the statute is set out, in which it appears that the remedy is given upon the *neglect or refusal* of any person, company, or corporation to pay any tax assessed on the lands of such person, company, or corporation; and in the course of his reasoning Mr. Justice GRANT says:

"The township treasurer is made the agent of the State during his term of office to commence suit whenever the occasion arises. He could not well bring the suit while the tax roll is in his hands, because the taxpayer is entitled to all that time within which to pay. There might be a refusal, but there could not well be a neglect, to pay within the time limited for payment. By the very terms of the act, no suit can be brought until the expiration of the time specified by law for payment."

The bill in this case was filed February 18, 1890. The time for the collection of taxes had been duly extended until the 1st day of March, 1890; and the tax roll and warrant were lawfully in the hands of the township treasurer at the time the bill was filed. Ward had the right at that time, and until the roll was returned, to pay the taxes to such treasurer. It is claimed by defendants' counsel, from the language of the opinion as above given, that the officer had no right to file this bill until he had returned the tax roll to the county treasurer. The circuit judge took this view of the case,

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and dismissed complainant's bill. Complainant appeals.

It must be admitted that the language of our opinion, when the case was here before, justified the court in his action; and it may be that it ought to be considered as the law of this case in view of such language. The language is capable of broader interpretation than was intended. The argument of this Court in such opinion had in view more especially the statutory time of payment, which is limited to the months of December and January, and did not take into consideration the fact that the time of collection had been extended, as such fact did not appear in the record before us, and the defendants were then contending that the bill was filed too late, and the reasoning of the opinion was meeting this objection. A careful reading of the statute convinces us that the Legislature intended that a refusal to pay the tax when lawfully demanded should be sufficient to maintain the bill. It reads, "neglect or refusal." If the word "and" had been used instead of "or," the contention of the defendants would be correct that the bill could not be filed so long as the person against whom the tax was assessed had the lawful right to pay it to the township treasurer. But we are satisfied that upon a refusal to pay at any time after the tax could be lawfully demanded the treasurer would have a right to file his bill under the statute, although he had not returned his tax roll.

The testimony, however, in this case fails to show that David Ward, against whom the taxes were assessed, refused to pay such tax before the filing of the bill in this cause. It appears that the treasurer called upon the agent of Mr. Ward, who refused to pay the taxes without consulting Mr. Ward, on the ground that they were too high. The treasurer says:

"He [Ward's agent] took a list of all the lands, and

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filled out the receipts the same as if he was going to pay them, and he said that he would send them to Mr. Ward, and see what he would do about it."

The treasurer did not see Mr. Ward before the bill was filed. He wrote to him, but received no answer. Mr. Ward was a non-resident of the county. After the suit was commenced, Ward paid $200 of the taxes, and the injunction was released. The whole amount assessed against him was a little over $600.

There should be, in order to warrant the filing of a bill of complaint under this statute before the expiration of the time in which taxes can be paid to the township treasurer, a positive, unequivocal refusal to pay them, or some portion of them. There was no such refusal shown in this case. Therefore the bill was rightfully dismissed.

We do not, however, think that this appeal can be called a vexatious one, as contended by the defendants' counsel. We are glad of the opportunity to correct so much of the language of our former opinion in this case as might, perhaps, reasonably lead to the inference that under no circumstances could a bill be filed under the statute (which will be found on page 379) while the tax roll remains lawfully in the hands of the township treasurer.

The decree is affirmed, with costs.

CHAMPLIN, C. J., LONG and GRANT, JJ., concurred. MCGRATH, J., did not sit.

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THE PEOPLE v. JAMES N. MILLER ET AL.

Constitutional law—Title of act—Destruction of fish—Penalty.

1. The object of Act No. 512, Local Acts of 1887, which makes it unlawful to take, catch, or kill any fish in Klinger lake with spear, net, grap-hook, or by use of jacks or artificial light of any kind, or any kind of fire-arms or explosive material, or other device, except by hook and line, is clearly expressed in its title, namely, "An act to prevent the destruction of fish in Klinger lake."
2. It was held in *Insurance Co. v. Raymond*, 70 Mich. 485, unnecessary to indicate in the title of a law any punishment for the violation of its provisions.

Error to St. Joseph. (Loveridge, J.) Submitted on briefs November 11, 1891. Decided November 13, 1891.

Respondents were convicted of violating Act No. 512, Local Acts of 1887. Conviction affirmed. The facts are stated in the opinion.

F. W. Knowlen and *Howell, Carr & Barnard,* for respondents.

A. A. Ellis, Attorney General, and *H. P. Stewart,* Prosecuting Attorney, for the people.

GRANT, J. The respondents were convicted of the violation of Act No. 512, Local Acts of 1887, entitled "An act to prevent the destruction of fish in Klinger lake."

Section 1 makes it unlawful for any person to take, catch, or kill any fish in said lake for the term of 10 years, with spear, net, grap-hook, or by the use of jacks or artificial light of any kind, or any kind of fire-

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arms or explosive material, or other device, except by hook and line.

Section 2 imposes a penalty for any violation of the act.

Three objections are raised to the validity of the act:

1. That the object is not expressed in its title.

2. That the title is inconsistent with the provisions of the act.

3. That the title to the act does not indicate that there is any punishment attached to a violation of its provisions.

We see no force in either of these objections. It is too clear for argument that the prohibited acts tend to the destruction of fish. The object, therefore, is found clearly expressed in the title. There is but one general object of the law, and the title fairly indicates it.

The last point is ruled by *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 485, wherein it was held unnecessary to indicate in the title of a law any punishment for the violation of its provisions. It was there said:

"The act must, of necessity, visit some form of punishment or penalty for violations of its provisions, as the penalty is the only lever that could give practical effect to the law."

Conviction is affirmed.

The other Justices concurred.

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ROBERT B. BAIRD v. PATRICK SHEA, SUPERVISOR OF THE TOWNSHIP OF COTTRELLVILLE.

Statutes—Alteration of school-districts—Misdescription of lands.

Act No. 382, Local Acts of 1891, which detaches certain territory from graded school-district No. 1 of the township of Cottrellville, in the county of St. Clair, and attaches it to school-district No. 7 of the same township, is not void because of a mistake in the description of the land detached, namely, designating a section as fractional when not so, and a private claim as No. 198, when it should be "598," there being no private claim other than No. 598 in the district.

Mandamus. Submitted November 17, 1891. Denied November 18, 1891.

Relator applied for *mandamus* to compel respondent to assess certain land for school purposes. The facts are stated in the opinion.

Atkinson, Vance & Wolcott, for relator.

A. E. Chadwick, for respondent.

PER CURIAM. Relator files this petition as director of Union school-district of Marine City, to compel respondent to assess 1,300 acres of land lying outside the city limits, for school purposes, as belonging to said district.

The city of Marine City was organized under Act No. 500, Local Acts of 1887. Section 3 of the act provides that—

"The said city of Marine City shall, in all things not herein otherwise provided, be governed, and its powers and duties defined and limited, by an act entitled 'An act for the incorporation of cities,' being act number one hundred and seventy-eight of the session laws of

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eighteen hundred and seventy-three: * * * *Provided*, that chapter twenty-eight of said act number one hundred and seventy-eight, entitled 'Education,' shall not form any part or portion of the charter of said city of Marine City, nor have force or effect therein: *And provided, further*, this act shall not be construed as in any way changing or interfering with the school-districts of the present township of Cottrellville, in said county of St. Clair, as now organized: *And provided, further*, that the said city of Marine City shall in all respects have the same power, duty, and authority within its territory, in all matters pertaining to the primary school laws of this State, that townships now have under the provisions of law."

The territory forming the city, which was formerly a duly-organized village, was in school-district No. 1 of the township of Cottrellville. Some 1,300 acres of land outside the city limits were included in this school-district, and remained within the district after the organization of the city. In 1891 the Legislature passed an act (No. 382) entitled—

"An act to detach certain territory from graded school-district No. 1 of the township of Cottrellville, in the county of St. Clair, and attach the same to school-district No. 7 of the township of Cottrellville, St. Clair county."

The territory detached by this act was described in it as section No. 2, fractional, section No. 11, and all that portion of private claim No. 198 of township 3 N., range 16 E., within the limits of said district No. 1, and was assessed by respondent in district No. 7.

Section 1 of chapter 28 of the act providing for the incorporation of cities (How. Stat. § 2739) provides that school-districts therein shall be a body corporate by the name and style of the "Public Schools of the City of ———." By the express provisions of the act incorporating the city of Marine City, that city is exempted from the provisions of chapter 28. The argument of

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counsel for relator, therefore, based upon that chapter, does not apply.

The relator describes himself as "the director of Union school-district, constituting the city of Marine City." The record gives us no information as to how this title was obtained, or how the district was organized. Under this record, and the act above referred to, we must assume that the districts remained the same, both as to designation and boundaries, as they did before the passage of the act incorporating Marine City.

There is no such land as private claim No. 198; it should have been 598; and it is also claimed that there is no fractional section 2, but it is complete section 2. Relator claims that these misdescriptions render the act void. It is not claimed that there is any private claim within the district known as "Private Claim No. 198," nor any other private claim than the one numbered 598. We think it was clearly understood what lands were meant, and in fact were included, in the act.

It follows that the petition must be denied.

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JEANE W. PULLING v. EDGAR O. DURFEE, JUDGE OF PROBATE OF WAYNE COUNTY.

[See 85 Mich. 34.]

Estates of deceased persons—Allowance to widow.

1. A widow is entitled as a matter of *right* to her reasonable sustenance out of the estate of her deceased husband for one year after his death, under How. Stat. § 5755; and, in case he died *testate*, the probate judge may use his discretion as to continuing the allowance during the progress of the settlement

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of the estate, but never for a longer period than until the widow's share is assigned to her.

2. It is the duty of a widow who applies for an allowance out of her husband's estate *after* the expiration of the statutory year, to make some showing of her needs and circumstances, if required by the probate judge.

Mandamus. Submitted November 17, 1891. Denied November 19, 1891.

Relator applied for *mandamus* to compel respondent to set aside an order assigning real estate to devisees, and to make an allowance to relator. The facts are stated in the opinion.

Fraser & Gates, for relator.

Charles B. Lothrop, for respondent.

PER CURIAM. This is an application for a writ of *mandamus* directing the respondent to set aside an order made by him assigning the real estate of Henry P. Pulling, deceased, to the devisees in his will named, and commanding him to make an allowance to the relator as the widow of said deceased.

Under the opinion and direction of this Court in *Pulling v. Durfee,* 85 Mich. 34, the respondent, on the 7th day of March, 1891, made an allowance to said widow, which he fixed at the sum of $2,200 for one year from and after the date of her husband's death, which year expired July 15, 1891; on which day respondent made an order assigning the personal property of the deceased, in which the widow was given the share that she would have received under the law had there been no will and no antenuptial agreement in existence. From this order the devisees under the will have appealed to the circuit court for the county of Wayne. On the 20th day of July, 1891, the relator applied to the respondent

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for a further allowance. This petition or application was resisted by the executor and devisees, and a hearing and argument had thereon September 10, 1891. The judge of probate has not made any allowance, but on the 24th day of October, 1891, made an order assigning the real estate of said deceased to the devisees under the will, which, it is claimed, is a practical denial of any further allowance to the widow.

The probate judge returns that on the hearing of the last application for allowance no testimony was produced by the relator showing her present needs and circumstances, and he was then of the opinion that he would not be justified in making an allowance unless there was some evidence of this kind. At the hearing relator's counsel declined to present any testimony, and submitted the matter without any such evidence. Afterwards the respondent became confirmed in the view he took upon the hearing, and personally saw the relator's counsel, and informed such counsel to that effect, but saying to him that, if he would fix a day when he would produce such evidence, the respondent would have the opposite parties present, ready for hearing at the time so fixed. He has made no order upon said petition, as he supposed that relator's counsel would follow his suggestion; but, if he had made any order, as the case stood he would have been compelled to deny the petition for further allowance.

As pointed out in *Pulling v. Durfee*, 85 Mich. 34, the statute provides that the widow *shall* have her reasonable sustenance out of the estate for one year (How. Stat. § 5755); and by section 5813, in the case of one dying testate, it is provided that—

"The probate court *may* make such reasonable allowance as may be judged necessary for the expenses of the maintenance of the widow and minor children, or either, constituting the family of the testator, out of his personal

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estate, or the income of his real estate, during the progress of the settlement of the estate, but never for a longer period than until their shares in the estate shall be assigned to them."

From these statutes it appears that the allowance must be made for one year, but after that the probate judge may use his discretion as to continuing the allowance.

It was the duty of the relator to make some showing of her needs and circumstances, if required by the probate judge; and, if the showing is made that she ought to have an allowance during the pendency of the appeal from the order assigning the personal estate, there is no reason in the papers before us to doubt that the respondent will grant her a reasonable sum for her maintenance.

The writ is denied.

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JENET F. MUELLER, ADMINISTRATRIX, ETC., v. THE BETHESDA MINERAL SPRING COMPANY.

Contract—Mutuality—Measure of damages—Loss of profits—Evidence.

1. The measure of damages for the breach of a contract by which the plaintiff was made sole agent in certain territory for the sale of mineral water of which the defendant was the sole proprietor, and which it agreed to furnish to the plaintiff at an agreed price, is the profits which the plaintiff might have realized on sales if the defendant had performed the contract; citing *Loud v. Campbell*, 26 Mich. 239; *Leonard v. Beaudry*, 68 Id. 312.
2. Evidence of the amount of water sold by a firm to whom the defendant transferred the agency in violation of the contract is competent to go to the jury on the question of damages.
3. Such a contract is not void for want of mutuality because it does not expressly provide that the agent shall hold out the

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goods to the public, and further the interests of the principal; such agreement being implied from the acceptance of the agency and entering upon the same.

Error to Wayne. (Brevoort, J.) Argued June 5, 1891. Decided November 20, 1891.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Henry M. Duffield, for appellant, contended:

1. The three letters established a contract; citing *Emery v. Cobbey,* 27 Neb. 621 (43 N. W. Rep. 410); *Hooker v. Hyde,* 61 Wis. 204; *Crook v. Cowan,* 64 N. C. 743; *Springer v. Cooper,* 11 Bradw. (Ill.) 267; *Railroad Co. v. Pixley,* 19 Barb. 428.
2. In support of right to show the amount of sales made by Bassett & L'Hommedieu, counsel cited *Leonard v. Beaudry,* 68 Mich. 312; *Loud v. Campbell,* 26 Id. 239; *Goodrich v. Hubbard,* 51 Id. 62.

Conely, Maybury & Lucking, for defendant, contended:

1. There never was any contract binding upon either party, because:

   a—There was no mutuality. Mueller agreed to do nothing and paid nothing; citing *Wilkinson v. Heavenrich,* 58 Mich. 574; *Leather Co. v. Kurtz,* 34 Id. 90, 92; *Pierce v. Pierce,* 55 Id. 629; *Teed v. Marvin,* 41 Id. 216.

   b—All of its terms were never definitely settled; citing *Van Valkenburg v. Rogers,* 18 Mich. 180; *Johnson v. Stephenson,* 26 Id. 63; *Ahearn v. Ayres,* 38 Id. 692; *Eggleston v. Wagner,* 46 Id. 610, 620; *McDonald v. Bewick,* 51 Id. 79; *Thomas v. Greenwood,* 69 Id. 215; *Whiteford v. Hitchcock,* 74 Id. 208, 211; *Lumber Co. v. Crosby,* Id. 313, 317; *Bowen v. McCarthy,* 85 Id. 26.
2. The contract alleged was not proved. This action is brought to enforce an executory contract, and in such a case the contract must be accurately and correctly described in the declaration, and the consideration truly set forth, else it will be excluded; citing *Bromley v. Goff,* 75 Mich. 213.
3. The damages claimed were wholly speculative and uncertain. No proof was offered of any advertising; hence the only allegation to be considered is the one regarding the profits on the sale of the water, and these were wholly speculative; citing *Fitzsimmons v. Chapman,* 87 Mich. 189; *Wetmore v. Pattison,* 45 Id.

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439; *McKinnon v. McEwan*, 48 Id. 106; *Allis v. McLean*, Id. 431; *Goodrich v. Hubbard*, 51 Id. 63, 69, 70; *Talcott v. Crippen*, 52 Id. 633; *Petrie v. Lane*, 58 Id. 527, 67 Id. 457; *Atkinson v. Morse*, 63 Id. 276; *Leonard v. Beaudry*, 68 Id. 312; *Maltby v. Plummer*, 71 Id. 578.

McGRATH, J. Plaintiff's intestate had been in the drug business in the city of Detroit for some years, and for a year before the making of the alleged contract sued upon had been selling Bethesda Mineral Spring water, purchased from defendant. In October, 1887, defendant wrote to plaintiff's intestate the following letter:

"WAUKESHA, WIS., Oct. 3, 1887.

"MR. J. C. MUELLER,

"Detroit, Mich.

"*Dear Sir:* Inclosed find bill and B. of L. for water sent to-day. Our traveling man, J. R. Smith, has informed us of your proposition, which we have considered, and have decided to make you the following offer, which we believe is the offer you make us, as we understand it: We will furnish you the plain water in barrels of 42 gallons, f. o. b. cars here, at $5 per barrel; and if from October 1, 1887, to October 1, 1888, our sales to you shall amount to $500, we will credit your account with $40, which amount, it is understood, you have spent for advertising the water; but, if our sales to you for the above-mentioned period shall not amount to $500, then we are to allow you nothing for advertising, and you are to pay us in full for each and every bill of goods. Of course we will not credit your account with the $40 for advertising until the sales shall have reached the necessary $500. We believe, if you spend $40 in judicious advertising, that you will have no trouble in bringing up your sales to $500 a year, and thereby make the Bethesda business a profitable one for you as well as for ourselves. If you accept this offer, please advise us by return mail, and this letter will be our agreement with you, as soon as we receive your acceptance of it. Trusting you will consider the matter favorably, and awaiting your reply, we are,

"Very truly yours, B. M. S. Co.

"HOWE."

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To which Mueller replied as follows:

"DETROIT, MICH., Oct. 10, 1887.

"BETHESDA M. SP. CO.,—

"*Gents:* Your favor of the 8th inst. received. Your agent's statement is correct as far as it goes, but it looks like playing Hamlet with the ghost left out. I am to be, and your agent agreed upon, *your sole agent* for city and surrounding parts. I am to receive profits and credit on all plain water sold about here, direct or indirect. Please inform me of your approval of this condition, and I consider the contract ratified.

"Yours truly,

"J. C. MUELLER."

Defendant, in response, sent the following:

"WAUKESHA, WIS., Oct. 12, 1887.

"MR. J. C. MUELLER,
120 Woodward Ave.,
"Detroit, Mich.

"*Dear Sir:* Yours of the 10th at hand. Excuse us for leaving out the 'ghost.' We will make you the sole agent for Detroit, and for all places within a radius of 25 miles from Detroit; and we will ship no plain water to any one in your territory but yourself. Trusting that this makes our offer all satisfactory and complete, we are,

"Very truly yours, B. M. S. Co.

"M."

No further correspondence was had between the parties until May, 1888, when defendant wrote the following letters to Mueller:

"WAUKESHA, WIS., May 9, 1888.

"MR. J. C. MUELLER,
Detroit, Mich.

"*Dear Sir:* We have just given Bassett & L'Hommedieu, of your city, the sole agency for Detroit. There was about one-tenth of the water being sold in Detroit that there should be, and we felt it but justice to ourselves to establish an agency that would push the water. We trust you will favor them with your order when in need of Bethesda, and, thanking you for your past patronage, we are,

"Very truly yours, B. M. S. Co.

"H."

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"WAUKESHA, WIS., May 9.

"MR. J. C. MUELLER,
Detroit, Mich.

"*Dear Sir:* Yours of the 9th at hand. We will be unable to fill your order, as we wrote you yesterday that we had made other engagements. Bassett & L'Hommedieu's report that they are sole agents is true. There is no treachery about it. We were not doing the business in Detroit that we should do, and could not induce you to push the water, or handle our water in one-half gallons, so we thought it for our interest to make a change; and you, as a business man, know that it is for the interest of every concern to do all the business they can.

"Very truly, B. M. S. Co.
"H."

Mueller died some time after this suit was commenced.

The defendant contends:

1. That the contract, as modified by defendant's letter of October 12, 1887, was never accepted by Mueller. This objection is untenable. Mueller entered upon the agency at once, and acted in that capacity until May, 1888, when defendant appointed another sole agent in Mueller's stead, giving as a reason therefor that Mueller was not pushing the sale of the mineral water.

2. That the contract was void for want of mutuality. Neither is this objection well taken. The company appointed Mueller as its sole agent for Detroit and vicinity, agreeing that, if he would take the agency, it would sell him the water at a certain figure, allow him $40 on his advertising bill in case his purchases reached a named amount, and that it would ship no plain water to any other person within certain territory. Mueller had been handling these goods, and the appointment was made in response to a proposition on Mueller's part, referred to in defendant's letter of October 3, 1887, to act as agent of the company. He agreed to act as sole agent of the company for the sale of these goods at Detroit. By the acceptance of that agency he agreed to

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do all that its acceptance implied, viz., to hold out the goods to the public, and to further the interests of his principal. One who receives goods on commission does not usually expressly agree to do anything, but there is in this class of cases an implied agreement, sufficient to support the promise and contract. If the interest of defendant here had been neglected, defendant was entitled to show that upon the trial.

Plaintiff called as a witness, Arthur Bassett, one of the members of the firm to which defendant had transferred the agency, and sought to show by him how much of the water had been disposed of by that firm from May 9, 1888, to October 12, 1888, but the court excluded the testimony. This was error. It was shown that, while this water was sold in bulk by the gallon, yet it was sold largely by the glass from a fountain as an incident of the retail drug business; that the best season for its sale was just opening when the agency was taken away from plaintiff's intestate. The measure of plaintiff's damages was the profits which Mueller might have realized if defendant had performed its contract. *Loud v. Campbell,* 26 Mich. 239; *Leonard v. Beaudry,* 68 Id 312. While it may be true that Mueller would not have disposed of as much of the article as this firm did, yet the amount of their sales, while not conclusive upon defendant, was competent evidence to go to the jury upon the question of plaintiff's damages. It would have been proper to draw out upon cross-examination what special effort had been made by this firm to introduce and push this commodity, but the sales for the season named may have been greater than for the previous season because of a demand created by what Mueller did, rather than by any special effort by this firm. Here was a commodity of which defendant was the sole proprietor, and for which Mueller was made sole agent. All of this commodity

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reaching the territory named came from defendant directly to Mueller, and through his agency. The agency of the firm of Bassett & L'Hommedieu succeeded that of Mueller. They took it up where he left off, and continued it for the five months for which he was to enjoy its fruits. Proof as to the amount actually sold by them for that five months cannot be said to be speculative.

After the court excluded this testimony plaintiff rested, and on defendant's motion the court directed a verdict for defendant.

The judgment is reversed, and a new trial ordered, with costs to plaintiff.

The other Justices concurred.

HERMAN HENNEBERGER v. ELIAS MATTER.

Principal and agent—Evidence—Promissory note—Bona fide purchaser—Fraud.

1. Agency cannot be established by testimony as to the statements of the alleged agent relating to the *fact*, or to the possession of any of the *indicia*, of agency.
2. It cannot be assumed that the sale of a patent is fraudulent, or that, because it afterwards turns out to be of little or no value, that fact alone indicates fraudulent intent in the vendor.
3. While it is true that fraud need not be shown by direct proof, and may be, and generally is, proven by inference from facts and circumstances, yet it cannot be presumed from mere suspicion, nor from facts or circumstances which are entirely consistent with an honest purpose.
4. The evidence in this case is held insufficient to support the finding of the court that the plaintiff was not a *bona fide* purchaser of the note sued upon; there being no competent testimony to support the further necessary finding that plaintiff's alleged agent had possession of plaintiff's stock at the time

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of the sale of certain other stock to the defendant, or during the negotiations which led up to its sale, and the giving of the note in payment for the same.

Error to Kent. (Burch, J.) Argued June 11, 1891. Decided November 20, 1891.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Taggart & Denison, for appellant.

McGarry & Ford, for defendant.

McGRATH, J. Plaintiff brings suit upon the following promissory note:

"$750.00. GRAND RAPIDS, February 5, 1889.
"Six months after date I promise to pay to Fred Kaltenbeck, or order, seven hundred and fifty dollars, at the office of Nelson, Matter & Co. Value received.
"ELIAS MATTER."

The note is indorsed as follows:

"FRED KALTENBECK.
"W. M. STARLEY.
"T. WINTER."

The cause was tried by the court, who found for the defendant, and plaintiff appeals. The court presented the following findings:

"The plaintiff is a commission merchant, residing at Mt. Pleasant, Westchester county, N. Y., and having his office at 317 Washington street, New York city. During the time covered by negotiations which resulted in the giving of the note in suit, the plaintiff was stockholder, director, secretary, and treasurer of the International Automatic Car-coupler Company. This company was a corporation organized under the laws of the state of New Jersey, and had its business office at 317 Washington street, New York city, in the office of the plaintiff. The property of the company consisted of letters patent of the United States, some draw-bars, models, and

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patterns. It had no shop for manufacturing draw-bars or car-couplers, and it had not, to plaintiff's knowledge, any contracts from any railroad company to use its draw-bars. It was organized as early as January 13, 1887. The plaintiff was vice-president in 1887, before being elected secretary and treasurer. The president of the company was one Thomas Winter, and said Fred Kaltenbeck was a stockholder. The plaintiff and said Winter had been informed on or about January 17, 1887, that the invention was an infringement. The most of the stock was held by eastern parties.

"The defendant is a member of the firm of Nelson, Matter & Co., manufacturers and wholesale dealers in furniture in Grand Rapids. About the middle of December, 1888, the said Fred Kaltenbeck came to the office of said defendant with a model of a car-coupler belonging to the International Automatic Car-coupler Company, and left it on the desk of defendant. He also brought with him a patent hat-rack, which he claimed to desire the defendant's company to manufacture. About four weeks afterwards, Kaltenbeck came to defendant's office again, and commenced a conversation about the car-coupler, the model of which he allowed to remain on defendant's desk during his absence. During the conversation the said Kaltenbeck exhibited to the defendant a number of certificates of stock, indorsed in blank, of the International Automatic Car-coupler Company, and represented that the patents that belonged to the company were worth $50,000; that it had procured and then had an order from the Detroit, Lansing & Northern Railroad Company for sufficient draw-bars so that the profit thereon would realize the sum of $1,000; that the coupler was a new and valuable improvement, and was in use on the D., L. & N. R. R., and giving good satisfaction; that the company had at the Michigan Malleable Iron Works, at Detroit, $600 worth of couplers, already manufactured and paid for, which could be immediately used to partially fill the order obtained from the D., L. & N. R. R. These representations were false. He also stated that he desired to interest the defendant in the enterprise, and would sell him twenty-five shares for $750, and desired defendant's note for that amount, due in six months. He also represented that the avails of said shares would, by the time the note fell due, earn at least

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$500, and offered to give him his own note for $250, which, with the $500 the stock would earn, would equal, he claimed, the amount of said note.

"The defendant relied on these statements and representations, and gave the note on which the suit was brought. and Kaltenbeck gave the note for $250, due six months from date, and transferred to the defendant the certificate of stock. * * * * * * * * *

"The plaintiff was not a *bona fide* purchaser. He was not only the promoter of a scheme by which the fraud was practiced on the dofendant, but was, with others, a participant in the avails thereof. * * * * *

"I therefore conclude, as a matter of law, that the note in question was obtained from the defendant by false and fraudulent representations; that the plaintiff was participant in the avails of such fraud; that the defendant seasonably and properly rescinded said contract, and the plaintiff is not entitled to recover.

"Passing specifically upon the points of law submitted by the plaintiff's counsel: I do not consider the fact that Kaltenbeck had in his possession the plaintiff's certificate of stock prior to or at the time of effecting the sale to the defendant, indorsed in blank, with others, as alone proving an agency in the transaction by Kaltenbeck for the plaintiff and others, but taken in connection with other facts and circumstances in the case, and especially with the receipt and distribution of the avails of such sale, conclude that his possession of such stock, indorsed in blank, was one of the circumstances which gives color to and characterizes the whole transaction as a scheme to cheat and defraud, in which the plaintiff was a participant."

The plaintiff testifies that he received the note from Kaltenbeck in March, 1889, in payment for some stock in the International Automatic Car-coupler Company; that the note was more than the amount of the stock; that he was allowed a small amount for expenses which he had incurred on behalf of the company, and that the balance was turned over in cash to Thomas Winter by direction of Kaltenbeck; that he had not previously placed the stock in Kaltenbeck's hands for sale, or to negotiate its sale; that he had not authorized Kalten-

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beck, in any way, shape, form, or manner, as his agent, to offer stock for sale; that he had never intrusted or delivered the certificates of stock to Kaltenbeck to be offered for sale to anybody; that he sold his stock to Kaltenbeck for $481.50; that $60 was allowed him for expenses, which he had incurred on behalf of the company, and $191.50 was paid to Winter by check, at Kaltenbeck's direction, as part payment for stock which Kaltenbeck was at the same time purchasing from Winter, and the balance was allowed as discount upon the note; that Matter was a member of the New York firm of whom plaintiff at the time of the negotiation inquired as to Matter's responsibility, and plaintiff required the other indorsements upon the note before taking it. The check given by plaintiff to Winter was produced as an exhibit.

Winter testifies that he was present when plaintiff sold his stock to Kaltenbeck; that it was on the 21st day of March, 1889; that Kaltenbeck, at the same time, bought stock from the witness; and that plaintiff had, by Kaltenbeck's direction, paid to the witness about $200.

Upon cross-examination of the witness Winter he testified as follows:

"*Q.* But you are certain that the stock held by the eastern parties was not transferred to him in blank, so that he could take it and sell it to other parties for that particular purpose?

"*A.* Yes, sir.

"*Q.* Then, if he had any stock in said company except that issued to him, do you know how he obtained it?

"*A.* I do.

"*Q.* Well, how?

"*A.* About a year before this transaction he came to my house in Margaretville, and negotiated with me for the sale of this stock,—Mr. Henneberger's and others. * * * He told me that if we would let him take that stock to Michigan he would send us the pay for them.

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I think it was $2,000. I refused to do it in that way, but told him I would make a sight draft for that amount, and send it there to some bank in the regular way in such matters, attaching this draft to the stock. I deposited the draft and stock with the Ulster Co. National Bank. It was sent to Michigan, to Stanton. The stock was indorsed in blank by the different owners at his direction. The draft was not paid. It came back with the stock, and the owners of the stock left the stock with me for safe-keeping, as president of the company. Something like eight or ten months after that Mr. Starley, of New Kingston, N. Y., a responsible man, came to me, and asked me to let him have the stock. I allowed him to take the stock, and I have his written receipt for the same in my possession at Margaretville, and he allowed Mr. Kaltenbeck to take the stock for the purpose of examining it. I do not know that, but I was informed of it. It was for the purpose of showing some one that it was a regular organized company, as Kaltenbeck stated to Starley.

"*Q.* Is that the only way you account for his having the stock indorsed in blank?

"*A.* Yes, sir.

"*Q.* That is all there is of it?

"*A.* I saw Starley let Kaltenbeck have it after that.

"*Q.* How did you obtain Hanneberger's stock to turn over to Starley at that time?

"*A.* I have told you before that it was in my hands for safe-keeping."

Re-direct examination by Mr. Hildreth:

"*Q.* Did Mr. Henneberger, the plaintiff in this action, know that you loaned this stock, indorsed in blank, to Starley, to be loaned to Kaltenbeck for any purpose, at the time when it took place?

"*A.* No, sir.

"*Q.* When did you first communicate that fact to him?

"*A.* To-day."

Winter's testimony was taken by deposition, to which the following was attached before signature:

"The foregoing deposition having been read over by

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the witness, Thomas Winter, before subscribing and swearing to the same, he states that he desires to make a correction therein, which the commissioner allowed, and in person takes down as follows, to wit: I have read over the foregoing deposition, and desire to make the following correction: In examining the receipt for stock in the International Automatic Car-coupler Co. given to me by Mr. Starley at the time of the delivery of the stock to him, referred to in my testimony on page 8 hereof, I find that no part of the stock of the plaintiff, Mr. Henneberger, was included therein, and that Mr. Starley never received from me any of the stock of said company belonging to Mr. Henneberger, and Mr. Kaltenbeck never had any of the stock which belonged to Mr. Henneberger in his possession for any purpose until the 21st day of March, 1889, when 24 of said shares were sold to him by Mr. Henneberger, and regularly transferred on the books of the company. The receipt given me by Mr. Starley shows the stock actually delivered to him as stated by me on page 8 hereof, and identified by me, and attached hereto in explanation and corroboration of this correction of my testimony. My previous testimony in relation to that transaction was based upon my recollection alone."

The receipt is as follows:

"Rec'd of T. Winter fifty-seven shares of International Automatic Car-coupler Co. stock, as follows, viz.: No. 15, 25 shares, W. D. Swart; No. 13, 25 shares, T. Winter; and No. 27, 7 shares, E. A. Rase,—all of which we agree to return within thirty days, or, in case not returned as above, we hereby agree to bind ourselves to pay for the same the sum of fifteen hundred dollars on demand. And we hereby authorize T. Winter to deliver said stock to Fred Kaltenbeck.

"*Dated Margaretville, Jan.* 10, '89.

"W. M. STARLEY.
"H. A. STARLEY."

Defendant was allowed to testify, under objection, to statements made to him by Kaltenbeck, regarding the operations of the company and its prospects; that Kaltenbeck came to him in December, 1888, and left a

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model of the car-coupler, on which the patents were issued, on defendant's desk.

"He said it was valuable; that the parties that were interested in it in the East were not working it to his satisfaction. He wanted to have business men interested in it that would put it on the market. I did not take any stock in it at that time, but I thought the patent was valuable; it looked plausible to me. He took the model with him, and in a couple of weeks he came back again, and exhibited certificates of stock of the International Automatic Car-coupler Company. He exhibited certificates of different denominations, and I finally bought one. * * * I think he had a half dozen, at least, of the certificates signed in blank. * * * He claimed that he had all the stock held by eastern parties, Swart, Henneberger, Winter, and they were the principal stockholders. There was a little held in Stanton, Mich., that he did not have. * * * * * * * * * *

"*Q.* You say that Mr. Kaltenbeck claimed that he had with him certificates for all of the stock held by eastern parties. At what time did he make that claim?

"*A.* At the time when he came down here from Stanton.

"*Q.* About when was that?

"*A.* That was after the note was sent out here for collection. I could not tell you the date now. * * *

"*Q.* Did he have some certificates of stock with him then?

"*A.* Yes, sir.

"*Q.* Show it to you?

"*A.* Yes, sir; I think he had all the stock with him. I could not say whose stock that was,—whether Henneberger's stock was among it, Swart's, or whose it was. I think he had it all. There was only about 200 shares issued. He claimed they were a hundred dollars a share.

"*Q.* He had a bundle of stock there?

"*A.* Yes, sir. * * * * * * * * * *

"*Q.* Now whether or not, in speaking about Henneberger as being one of the parties in interest when you were talking about the stock,—I wish to ask you whether or not, in talking about the company, and who composed it, if he did not hold up Henneberger as being a sharp, shrewd business man.

"*A.* Yes, sir.

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"*Q.* Who were the parties that he talked about as owning the stock?

"*A.* He mentioned Henneberger's name frequently; that he was engaged in a large business there, and could not give this matter any attention."

The stock purchased by defendant was represented by the following certificate:

"No. 15. 25 Shares.

"THE INTERNATIONAL AUTOMATIC CAR-COUPLER COMPANY.

"This is to certify that William D. Swart is entitled to twenty-five (25) shares of the capital stock of the International Automatic Car-coupler Co., transferable only on the books of the company in person or by attorney, on the surrender of this certificate.

"*Newark, N. J., twelfth day of January,* 1887.

"WILLIAM D. SWART, T. WINTER,
"Secretary. President."

Upon the back of said certificate was the following indorsement:

"For value received I hereby assign and transfer unto Elisha Matter twenty-five shares (25) of the capital stock of the International Automatic Car-coupler Company, and do hereby irrevocably constitute and appoint ———, of ———, true and lawful attorney to make the necessary transfer thereof on the books of the company.

"In witness whereof I have hereunto set my hand and seal this 10th day of January, 1889.

"W. D. SWART.

"T. WINTER, Witness."

Under objection, an opinion given by New York patent attorneys in January, 1887, to Winter as president, was admitted. It sustained the validity of the patent, but raised a question as to whether certain of the claims made did not infringe upon a prior patent; but in conclusion the attorneys say:

"We will observe that too much importance to the fact of Kaltenbeck infringing Grassler need not be given, because the latter patent will expire by limitation two years from November of the present year. Hence your

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Kaltenbeck patent will have at least fourteen years of life free of any possibility of an infringement charge."

It will be seen that the court bases his finding as to Kaltenbeck's agency upon the fact assumed, but not found, that Kaltenbeck had in his possession at the time of his negotiations with defendant, and exhibited to defendant, plaintiff's certificate of stock indorsed in blank by plaintiff; but the only testimony tending in the remotest degree to support such conclusion was Matter's testimony that Kaltenbeck told him that he had the certificate. It is not clear from defendant's testimony just when Kaltenbeck claimed to have in his possession plaintiff's stock, whether it was at the time of the negotiations between Kaltenbeck and defendant, or some months afterwards, when defendant, Kaltenbeck, and others were planning for the formation of a new company. The stock which was transferred to defendant was the stock of one Swart, and defendant received it February 5, 1889, while plaintiff's stock was not sold to Kaltenbeck until March 21, 1889. There was no testimony tending to show that defendant ever saw the plaintiff's certificate of stock, and no competent testimony tending to show that Kaltenbeck ever had it in his possession. Plaintiff's testimony was clear and positive that Kaltenbeck did not have possession of plaintiff's stock before its purchase in March, and there is no question but that he had possession of it after he had purchased it, and at the time that he and defendant, with others, were arranging for the formation of the new company. Upon cross-examination, defendant testifies that it was at this latter time that Kaltenbeck told defendant that he had the stock.

Kaltenbeck's agency could not be established by testimony as to his statements to defendant, whether those statements related to the fact of agency or to the possession of any of the *indicia* of agency. There was there-

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fore no competent testimony to support a finding that Kaltenbeck had possession of plaintiff's stock at the time of the sale of the stock to defendant, or during the negotiations which led up to the sale, and, in the absence of such a showing, the evidence is insufficient to sustain a finding that—

"The plaintiff was not a *bona fide* purchaser. He was not only the promoter of a scheme by which the fraud was practiced on the defendant, but was, with others, a participant in the avails thereof."

Kaltenbeck's brother was the patentee. Naturally he had more faith in the possibilities of the patent than the eastern stockholders, and evidently, from the testimony, he was dissatisfied with the inactivity of the eastern company. Negotiations had been had with the Detroit, Lansing & Northern Railroad for the adoption of the coupler, and for the manufacture of the coupler by the Malleable Iron-works at Detroit. Kaltenbeck's object in the purchase of plaintiff's stock may have been the formation of a new company in this State; at least, his representations to plaintiff were in the line of and entirely consistent with such a purpose. After the sale to defendant, and the purchase of plaintiff's stock, arrangements were made by Kaltenbeck, defendant, and others for the formation of a new company.

It appeared that, nearly a year before the sale to defendant, Kaltenbeck had been negotiating with certain of the eastern holders of stock for its sale to him, with the express intention of its disposition in Michigan, and, as tending to show that the holders of that stock regarded it as of value, certain of them refused to intrust their stock to Kaltenbeck, except through the banks, with a sight-draft attached; and finally 57 shares of the stock, including the shares sold defendant, were intrusted to the Starleys, who were responsible, under an

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agreement to return the stock or pay the sum of $1,500 therefor, as shown by the receipt given by the Starleys.

There was no testimony tending to show that the patent was valueless, or that plaintiff regarded it as without value, and, from aught that appears, it may be of great value. It cannot be assumed that the sale of a patent is fraudulent, or that, because it afterwards turns out to be of little value, or of no value, that fact alone indicates fraudulent intent in him who sells. The value of all undeveloped patents is prospective, largely a matter of opinion, and to some extent may be said to be visionary, and this is a matter of common knowledge.

The misrepresentations made relative to the extent of the adoption and use of the device were material as against Kaltenbeck, and would have been a good defense as against him; but there was no evidence tending to connect plaintiff with these misrepresentations, or bringing them home to him. While it is true that fraud need not be shown by direct proof, and may be, and generally is, proven by inference from facts and circumstances, yet fraud cannot be presumed from mere suspicion, nor from facts or circumstances which are entirely consistent with an honest purpose.

The judgment is reversed, and a new trial ordered, with costs to plaintiff.

CHAMPLIN, C. J., LONG and GRANT, JJ., concurred with MCGRATH, J. MORSE, J., concurred in the result.

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LEVI TOWNSEND ET AL. v. THE CITY OF MANISTEE AND ELIAS R. WELSH, TREASURER.

Municipal corporations—Public improvements—Reassessments—Authority of council.

1. Where a special assessment is set aside by a city council, and the taxes reassessed upon the same district, the land-owners cannot complain of a want of notice of the original assessment in a suit to enjoin the collection of the reassessed taxes.
2. Where the proportion of the cost of the construction of a sewer to be paid by a city, as determined by the council, exceeded by $180 the sum appropriated in the annual appropriation bill for that purpose, which excess was appropriated from the general sewer fund, land-owners who seek to enjoin the collection of special assessments upon their property for the construction of such sewer cannot complain because of the non-submission of the question of the appropriation of the $180 to the electors, as required by the charter, they not being injured thereby.
3. Under a charter authorizing the city council to cause a new assessment to be made for a public improvement in place of an invalid one, a *majority* of the council have power to rescind their action in ordering the original assessment; and where the reassessment is ordered to be made by a vote of two-thirds of all of the aldermen elect, as required by the charter, the proceedings cannot be attacked because the original assessment was ordered by a greater number of the members of the council.

Appeal from Manistee. (Judkins, J.) Argued June 3, 1891. Decided November 20, 1891.

Bill to restrain the collection of special assessments, and to remove the lien created thereby. Complainants appeal from decree dismissing bill. Affirmed. The facts are stated in the opinion.

D. S. Harley, for complainants.

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Smurthwaite & Higgins and *Dovel & Smith,* for defendants.

LONG, J. The bill is filed in this cause to restrain the city treasurer and the common council of the city of Manistee from collecting, or attempting to collect, special assessments upon the lands of the complainants, and to remove the lien created by such assessments upon such lands.

The assessment is made for the purpose of defraying the expenses of the construction of a sewer, and the complainants' lands, among others, were included in the special assessment district. It appears that upon April 2, 1889, the common council of the city, under the provisions of section 4 of chapter 24 of the charter[1] of that city passed a resolution directing the city clerk to cause notice to be published of the intention to lay the sewer, and that the council would meet, and consider the objections and suggestions made by parties interested, at their council rooms on Tuesday, May 7, 1889, at 7:30 o'clock P. M. This notice was published, and on that date the council resolved—seven members out of eight voting therefor—to construct a sewer at a cost of $1,610, and directed by the resolution that $805 of the estimated cost be defrayed by special assessments, according to benefits, against the lands described in the resolution.[2] The complainants' lands were included. This assessment district was designated as "District No. 9," and the board of assessors which is provided for by section 2, chap. 24, of the charter, were directed and instructed to assess this sum of $805 against those lands. The sewer was thereafter constructed, and the assessment made of

[1] Act No. 48, Local Acts of 1882.

[2] The resolution also appropriated $180 from the general sewer fund for the purpose of this sewer, "the remaining $625 having been appropriated" therefrom.

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this sum by the board of assessors, and reported to the council, who confirmed the same.

It appears that thereafter the city of Manistee had some litigation over the construction of other sewers within the city, and, upon bill being filed in the circuit court in chancery in that county, their proceedings were held invalid by reason of certain irregularities and informalities therein. For this reason, at a meeting of the council held on March 11, 1890, the special assessments upon this sewer district were considered invalid by the council, and a resolution adopted vacating and setting aside this assessment. A reassessment upon the same district was thereafter ordered by the council, notice of which was duly published, and the taxes levied thereunder. It is this tax which the complainants by their bill seek to have set aside.

Several reasons are set up in the bill why the action of the council should be set aside by the court:

1. That the notice published did not mention the district to be assessed for the proposed improvement, as required by section 4, chap. 24, of the charter.

2. That, at the time when said notice was published, there had been no sewer district created for said sewer, and the plans and specifications did not show any sewer district, as required by section 8, chap. 21, of the charter.

3. That the resolution appropriated the sum of $180 over and above the amount appropriated for this purpose in the last preceding appropriation bill adopted by the council, in violation of sections 14, 15, chap. 26, of the charter.

These objections all relate to the original proceedings in the laying of the sewer, and not to the reassessment, and are but irregularities, which we think were cured by the after proceedings of the council. The notice published set out that it was the intention of the city to construct a lateral sewer, giving its direction, and the

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streets along which it would be laid, and stating that part of the estimated cost would be paid from the general sewer fund, and part assessed against the property benefited, and that plans and specifications and estimates of the cost of such improvement would be found in the office of the city clerk for examination. Section 4 of chapter 24 of the charter provides that—

"The council shall give notice * * * of the proposed improvement or work, and of the district to be assessed, by publication for two weeks, at least, in one of the newspapers of the city, and of the time when the council will meet and consider any objection thereto."

The notice published did not describe the district to be assessed, but in all other respects seems to have complied with this provision of the charter. Section 13, chap. 24, of the charter, provides, however, that—

"When any special assessment shall be reported by the board of assessors to the council, as in this chapter directed, the same shall be filed in the office of the city clerk, and numbered. Before adopting the assessment, the council shall cause notice to be published for two weeks, at least, in some newspaper of the city, of the filing of the same with the city clerk, and appointing a time when the council and board of assessors will meet to review the assessment. Any person objecting to the assessment may file his objections thereto in writing with the city clerk."

Section 14 provides that, at the time appointed for that purpose, the council and board of assessors shall meet and review the assessment, and the council shall correct the same, if necessary, or they may annul it, and direct a new assessment, in which case the same proceedings shall be had as in respect to the previous assessment. This section gives to all parties interested an opportunity to be heard. No complaint is made in the bill but that this notice was properly given; but, whether it was or not, the complainants are not in a position to complain

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of the original assessment, in view of that assessment having been wholly set aside by the council.

It appears that the annual appropriation bill for the preceding year appropriated to this sewer the sum of $625, and complainants complain that the appropriation of the $180 from the general sewer fund, over and above the amount so provided for by the annual appropriation bill, was not submitted to the electors of the city, as required by the charter. The complainants cannot complain of this. It was taken off of the amount of their assessment, and they are not injured thereby.

Under the reassessment, the complainants contend that the council had no power or authority to rescind their former resolution, for the reason that the resolution, as originally passed, authorizing and directing the construction of the sewer, was passed by seven out of the eight aldermen of the city, while the resolution to rescind was passed by only six votes, and that the resolution was adopted at a special meeting of the council.[1] Section 22, chap. 24, of the charter provides that—

"Whenever any special assessment shall, in the opinion of the council, be invalid by reason of any irregularity or informality in the proceeding, or if any court of competent jurisdiction shall adjudge such assessment to be illegal, the council shall, whether the improvement has been made or not, or whether any part of the assessments have been paid or not, have power to cause a new assessment to be made for the same purpose for which the former assessment was made," etc.

Under this provision of the charter, a majority of the council have power to rescind their action in proceedings of this nature. A two-thirds of all the aldermen elect having voted, under the provisions of the charter, for a reassessment and collection of the tax, their proceedings cannot be attacked upon the ground that the former

[1] Counsel cited section 7, chapter 8, of the charter.

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assessment had been voted by a greater number of the members of the council, and we think their proceedings regular for the laying of the tax under their last proceedings.

Some other questions are raised which we do not deem it necessary to discuss, as, from the whole proceeding, we are satisfied that the complainants have not made a case by their bill which would warrant the intervention of a court of equity in restraining the action of the treasurer or the council in the collection of these taxes. The bill was demurred to in the court below, and the demurrer sustained.

The decree of the court below will be affirmed, with costs.

The other Justices concurred.

HERMAN D. ZUCKER, HERMAN KOHN, AND HENRY D. HORWITZ v. SAMUEL KARPELES ET AL.

Practice in circuit court—Opening case to jury—Special questions—Fraudulent purchase—Rescission—Good-faith mortgagees—Right of possession—Equity jurisdiction.

1. In opening a case to the jury, counsel should not enter into a detailed statement of the testimony by which he expects to substantiate the facts of his case, but only call attention to the salient points, without repeating the evidence by which he expects to prove them; the object being to assist the jury to understand the testimony as introduced, and its bearing upon the issues involved; citing *Fosdick v. Van Arsdale*, 74 Mich. 304, 305.[1]

2. There is no rule of practice prohibiting an attorney from

[1] See *People v. Montague*, 71 Mich. 448; *Campbell v. City of Kalamazoo*, 80 Id. 656 (head-note 5).

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requesting a witness to repeat on cross-examination his direct testimony upon a particular point; nor is it a sufficient reason for refusing to permit cross-examination respecting what has been testified to that the witness has already testified upon that subject.

3. How. Stat. § 7606, as amended by Act No. 15, Laws of 1885, providing for the submission of special questions to the jury, is construed as follows:

a—It is error to refuse to submit such questions if proper in form and substance.

b—There can be no objection to the submission of the questions by the court to the opposite counsel for inspection, who has the right to frame questions, and to have the jury instructed to answer them if they find a general verdict against his client.

c—Counsel are not obliged to furnish special questions until after the arguments are closed, but if they do so there is no reason why the questions should not be discussed to the jury if they relate to the merits of the controversy.[1]

4. The failure of a vendee who knows that he is insolvent to disclose that fact to the vendor will not make the purchase fraudulent, unless coupled with an intent at the time of the purchase not to pay for the goods; citing *Shipman v. Seymour*, 40 Mich. 274, 283; *Garbutt v. Bank*, 22 Wis. 384; *Nichols v. Pinner*, 18 N. Y. 295.

5. Representations made by a merchant to a commercial agency as to the amount of his indebtedness, but not as to his assets, and not shown by any competent testimony to have been communicated to or relied on by vendors from whom he orders goods five months afterwards, have no tendency to prove an intention on his part not to pay for the goods at the time he gave the order.

6. Under the circumstances of this case, the request of the defendants' counsel that "fraud is not presumed, but must be proved, and the burden of proving fraud is upon the person charging it," should have been given to the jury.

7. After the commencement of proceedings to foreclose a chattel mortgage, the consideration for which was in part pre-existing

[1] See the following cases bearing upon the construction of this statute: *Pigott v. Engle*, 60 Mich. 221; *Oliver v. Sanborn*, Id. 347 (head-note 7); *Loomis v. Armstrong*, 63 Id. 357 (head-notes 12, 13); *Cook v. Clinton*, 64 Id. 310 (head-note 3); *Miner v. Vedder*, 66 Id. 101; *Thorsen v. Babcock*, 68 Id. 523; *Beecher v. Galvin*, 71 Id. 391; *Transportation Co. v. McMorran*, 73 Id. 467; *Balch v. Railroad Co.*, 78 Id. 654; *Sherwood v. Railway Co.*, 82 Id. 374; *Railroad Co. v. Campau*, 83 Id. 31.

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indebtedness due the mortgagees and their promise to pay certain notes on which they were liable contingently as indorsers, and in part cash advanced at the time of the execution of the mortgage, certain of the mortgagor's vendors replevied a small portion of the mortgaged goods, claiming to rescind the contract of sale because of the alleged fraud of the mortgagor in making the purchase, and recovered judgment. It was conceded on the trial that the mortgagees had no notice or knowledge of the alleged fraud, and that the consideration for their mortgage was *bona fide*. And in reversing the judgment the Court hold:

a—Where a debtor, for a new and valuable consideration, mortgages goods in his possession, which he has obtained under a contract of sale induced by his fraudulent practices, to a party who is ignorant of such fraud, and who acts in good faith, relying upon the ostensible ownership of the goods by the mortgagor before the defrauded vendor has rescinded the contract, the mortgagee may hold the goods against the title of the vendor, upon the equitable doctrine that, where one of two innocent parties must suffer by the wrongful act or default of another, the loss must fall upon him through whose act or neglect the third party was enabled to commit the wrong.

b—The doctrine is an equitable one, and extends no further than is necessary to protect the innocent party in whose favor it is invoked, and in this case only protects the mortgagees to the extent of the cash advanced to the mortgagor; they being already liable on the notes contingently as indorsers, and an executory promise, not changing their situation for the worse, not being such a consideration as will bring them within the protection of *bona fide* mortgagees or purchasers; citing *Dixon v. Hill*, 5 Mich. 404; *Warner v. Whittaker*, 6 Id. 133; *Blanchard v. Tyler*, 12 Id. 339, 342; *Stone v. Welling*, 14 Id. 514, 525.

c—It being conceded that the rights of the mortgagees up to the amount of cash advanced were superior to those of the vendors, and they having taken possession of the entire property under their mortgage, which possession was lawful between them and the vendors, if their superior rights could be terminated by after payment, which is not conceded, such payment not having been made, the vendors were not entitled to the possession of the goods at the time they brought suit.

d—It is not clearly seen how the rights of the vendors could be worked out and protected in a suit at law, and equity would seem to be the proper forum in which to adjudicate upon and protect the rights of the parties, under whose guidance the goods claimed by the vendors may be identified,

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separated, and applied to the discharge of the debt, namely, the new consideration for which they were security, and the surplus handed over to the owners, in case the whole security should be more than sufficient to discharge the debt for which it was pledged.

e—It is possible that in some cases, where the new consideration is inconsiderable in comparison with the value of the goods out of which the owner was defrauded, and was money advanced, the defrauded vendor might, by tendering such new consideration to the mortgagee, relieve the property from the operation of the rule before referred to, and entitle him to bring his action therefor in a court of law.

Error to Wayne. (Reilly, J.) Argued October 8, 1891. Decided November 20, 1891.

Replevin. Defendants Heavenrich bring error. Reversed. The facts are stated in the opinion.

Sloman, Berry & Duffie, for appellants.

Griffin, Warner & Hunt, for plaintiffs, contended:

1. The latitude to be extended to counsel in opening is largely a matter of discretion, which it would be impossible for this Court to regulate unless grossly abused; citing *Scripps v. Reilly*, 35 Mich. 371.
2. The general rule is that a transfer by a fraudulent vendee cannot confer a greater right than he himself has, nor can possession under a wrong-doer rise higher than that of the wrong-doer. The only exception to this rule is in favor of a *bona fide* purchaser for a then valuable consideration paid, and without notice of the infirmity of the transferrer's title; citing 2 Pom. Eq. Jur. §§ 738–751; *Devoe v. Brandt*, 53 N. Y. 462.
3. The settled rule in Michigan is that a *bona fide* purchaser is such only to the extent to which he has parted with his money; that the legal obligation must be irrevocable; that there must be an absolute change of the purchaser's legal position for the worse; and that it is wholly a doctrine of protection, and cannot be supported where the purchaser can be relieved from his obligations.
4. Applying this rule to the appellants, the moment they received back their $300, whether in a specific sum or as part of a larger amount, they could no longer seek protection on the trial by showing that they had made such an advance.

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CHAMPLIN, C. J. This is an action of replevin, brought to recover certain merchandise which the plaintiffs claim was purchased by defendant Karpeles, and possession thereof obtained through fraud.

The defendant Karpeles had been, and prior to November 16, 1889, was, a merchant in Detroit, and had been engaged in dealing in ready-made clothing for about six years in that city. During the month of July, 1889, an agent of the plaintiffs, who were doing business in the city of Cleveland under the name of Zucker, Kohn & Horwitz, solicited an order for goods from the defendant Karpeles. One of the plaintiffs, Mr. Zucker, was present when the order was taken. It is not claimed that any representations whatever were made by defendant Karpeles when the order was taken, but it is claimed by plaintiffs that the order was filled by the firm at Cleveland in reliance upon a report representing the financial standing of Karpeles made by Dun & Co.'s commercial agency February 6, 1889, which it is claimed they obtained at Cleveland from the commercial agency before the goods were shipped in August, which report it is also claimed contains an untrue statement of Karpeles' financial standing. The goods were shipped as follows: August 20, 1889, $845 worth; September 19, $175 worth; September 25, $161 worth; and on October 8, $20 worth.

The defendants Heavenrich Bros. are a firm also doing business in the city of Detroit, and it appears that on the 16th day of November, 1889, defendant Karpeles was indebted to them in the sum of $3,238.75, evidenced by four promissory notes, three of which had matured in the early part of the month of November, and one, for $1,215.75, would mature 60 days after October 3, 1889. Defendant Karpeles also owed them $350 for a check dated November 13, 1889, which they had exchanged with

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him for his accommodation. They were also indorsers upon his paper for notes held by Magnus Butzel, as executor of the Hess estate, to the amount of $4,500, maturing in December, 1889. It is claimed by Heavenrich Bros. that Karpeles did not protect them against the check which they had loaned to him, and they concluded to demand security for all of his indebtedness to them, and against their liability as indorser for him, and did so, but he refused at first; and when pressed he agreed to give them a chattel-mortgage security, subject to a mortgage which he would give to his brother-in-law, Fechheimer, for $6,168.82, which he claimed to owe him, and upon condition, as a consideration thereof, that Heavenrich Bros. should then advance him the further sum of $300 in cash, and pay the notes held by Butzel before maturity. Heavenrich Bros. accepted the proposition, and thereupon Karpeles executed a chattel mortgage to Fechheimer and also to Heavenrich Bros. for the indebtedness so claimed to be due to each, respectively, bearing date the 16th day of November, 1889, which was on Saturday. Heavenrich Bros. immediately took possession under their mortgage, and on Monday, the 18th, advertised the goods for sale on Saturday, November 23, 1889. On Monday, the 18th, plaintiffs replevied so many of the goods sold and delivered to Karpeles as they could identify, amounting to about $500 worth. Heavenrich Bros. caused an inventory of the stock of goods to be made, and sold them, pursuant to public notice, to Hudson, of Detroit, at 65¼ cents on the dollar. Mr. Heavenrich stated upon the witness stand that he did not remember the amount at which the goods were inventoried, but the amount received on the sale of them to Hudson was $10,566.30, and that amount, being 65¼ cents on the

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dollar, would give the amount at which the goods were inventoried at $16,193 and some cents.

Upon the trial of the cause in the Wayne circuit court the counsel for the plaintiffs in his opening to the jury, among other things, claimed that the goods involved in the suit were obtained by the defendant Karpeles from the plaintiffs at a time when he was insolvent, with the preconceived design not to pay for them, and by means of false representations; that after obtaining these goods he mortgaged them to the defendants Heavenrich and Fechheimer for a precedent debt, and an advance of $300 claimed to have been made by Heavenrich Bros. at the time of taking their mortgage; that upon ascertaining these facts the plaintiffs rescinded the contract of sale, and now claim to be entitled to the goods so obtained from them as aforesaid.

The theory of the defendants Heavenrich, which was presented to the jury, was that Heavenrich Bros. were ignorant of the purchase by defendant Karpeles from the plaintiffs of the goods in question, and that they received the mortgage in good faith and for a valuable consideration, a portion of which was paid to Karpeles at the time of the execution of the mortgage, and that, whether the purchase by Karpeles of the goods from the plaintiffs was fraudulent or not, they were innocent third parties in possession, and had a superior title to that of Karpeles' vendors.

The assignments of error cover questions of practice as well as questions of law. The counsel for the defendants Heavenrich Bros. complains and assigns as error that the court interfered with his opening of the case of the defendants Heavenrich to the jury, and would not permit him to state his defense and the facts which he expected to prove. We have examined the opening of the counsel for the defendants Heavenrich, and we cannot observe

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any such abuse of discretion as would justify us in sending the cause back for a new trial on account of the interruptions of the court in the course of his opening to the jury. Certainly it is not permissible for counsel to enter into a minute argument of the facts, and the bearing which they have upon the points of his defense, in opening his case to the jury.

As an instance of what we think was not permissible, we quote a sentence from the opening, at a point where the court interrupted on one occasion. Mr. Sloman, in addressing the jury, said.

"Now, gentlemen, I say to you that we shall claim that it makes no difference under what circumstances Karpeles bought these goods. If at the time Heavenrich Bros. took this mortgage he was owing them, and the next day—"

At this point the court interrupted, by saying to the counsel as follows:

"I do not think that is any part of your opening; that is a question of law. Confine your attention to the facts that you propose to prove."

We do not think it proper for counsel in opening to the jury to enter into a detailed statement of the testimony by which he expects to substantiate the facts of his case. He should call the attention of the jury to the salient points, and what he expects to establish, and not repeat to the jury the evidence by which he expects to prove the points claimed; the object of the opening being to assist the jury to understand the testimony as it is introduced, and the bearing it has upon the issues involved. We think, when counsel confine themselves to these objects, they will find no disposition upon the part of the courts to interfere with their opening. *Fosdick v. Van Arsdale*, 74 Mich. 304, 305.

Error is assigned upon the interruptions of the court,

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upon his own motion, while the defendants Heavenrich Bros.' counsel was cross-examining the witnesses introduced by plaintiffs.

One of the plaintiffs, Herman D. Zucker, was introduced as a witness in his own behalf, and on behalf of the firm of which he is a member, and he was examined as to the sale and shipment of the goods to the defendant Karpeles. He was also permitted to testify that his firm sold the goods to the defendant Karpeles relying upon certain representations which they had obtained from the commercial agency. In his direct examination he had testified that the order was taken in July, and that the first shipment was made in August, and later ones in September, and one in October, and that it was not expected that they would ship the goods at once, but from time to time. Upon his cross-examination he was asked:

"*Q.* As I understand you, these goods which go to make up this account were bought in July?
"*A.* No, sir.
"*Q.* Didn't you so state in your direct examination?
"*A.* No, sir.
"*Q.* Didn't you state in your direct examination that the order was taken in July, and the shipment made at different times?
"*A.* I do not remember that I did."

The court here interrupted the counsel with the question:

"*Q.* What is the object of this?
"*Counsel:* I have the right to examine him.
"*Court:* Yes, sir; he did say something about the order not being shipped in July, because he did not have the stuff on hand, or something like that. It was dated August 20. It is already answered."

Exception was taken to the court's remark and to the interruption. Again, further on in the cross-examination of this witness, he was asked by counsel for defendants:

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"Will you state just exactly what you said to him, as near as you can, and also his replies, substantially as he gave them?"

This question referred to a conversation which he stated to have had on November 18, in the afternoon, after the goods had been appraised, with defendant Karpeles. The court interrupted the counsel in asking the foregoing question with this question:

"Didn't he state all that this morning? Unless there is something more—"

Here the witness interrupted, and stated:

"I stated it this morning. I stated exactly what I said to him this morning. Whether I am to repeat it or not I don't know."

Counsel for defendants insisted upon an answer to the question.

"*By the Court:* I think not; you need not repeat it.
"*Mr. Sloman:* I ask it for the purpose of testing the memory and credibility of the witness."

The court noted an exception. The witness had further stated in the direct examination that in this conversation with Mr. Karpeles he had been referred by him to his attorney, Mr. Douglas, and that he, with his attorney, Mr. Berry, went to call upon Mr. Douglas at his office, and he detailed a conversation which occurred at that interview. The witness was somewhat confused in his statements as to what was said by Mr. Douglas, and whether he heard it spoken or whether Mr. Berry had told him afterwards what Mr. Douglas said. His attention was again called by counsel for the defendants to that conversation, and this question was asked him:

"*Q.* Tell the jury what part of that conversation Mr. Berry told you and what part Douglas told you.
"*Counsel for the Plaintiffs, Mr. Griffin:* He said he could not tell.

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"*The Court:* I think he has explained it sufficiently.
"*Mr. Sloman:* He has explained it several different ways.
"*The Court:* Then you have the benefit of the several explanations. Note an exception."

The witness W. G. Pungs was produced on behalf of the plaintiffs, and testified that he was reporter for the commercial agency Dun & Co., and had been since 1872; that he called upon Mr. Karpeles in 1889, as the agent for R. G. Dun & Co., to get a statement from him; that Karpeles did not invite him; that the statement was not in writing,—it was a conversation that he had with him, a verbal statement from him,—and that he made a memorandum at the time, and took it to the office, and put it upon the records. He was asked if he had that memorandum by Mr. Sloman, who objected to the witness stating what the conversation was unless he produced the report that he made at the time the conversation was had, and which he said was then on file at his office. The court overruled the objection, and allowed an exception. He was then permitted to testify what Mr. Karpeles said, and that he sent out a statement embodying the report to their customers all over the country. He stated also that in that conversation the defendant Karpeles said nothing about his assets, and that he did not make any detailed statement as to his assets. Upon cross-examination the counsel for defendants Heavenrich asked the witness:

"State again just what he said as to his financial condition.
"*The Court:* That I will exclude; he stated it just now.
"*Mr. Sloman:* I ask this question for the purpose of testing the recollection of the witness as regards the particular language used by Mr. Karpeles."

After taking an exception to the ruling, counsel repeated:

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"I ask you to state in substance what he said, and what you said in reply.

"*The Court:* That is under the same head. Note an exception. I do not think a cross-examination consists in asking a witness merely to repeat his testimony."

There is more of the same kind, upon which error is alleged in the record, but sufficient appears to enable us to pass upon the merits of the exceptions.

We think the court erred in not permitting the counsel for the defendants to cross-examine the witnesses fully. We know of no rule of practice that prohibits an attorney from requesting a witness to repeat what he has testified to upon a particular point in his direct examination. He has a right to have it repeated, for the purpose not only of testing the recollection of the witness, but of ascertaining whether he makes a statement at variance with what he testified to in chief. Of course it would not be permissible for an attorney to pass through the whole of the direct examination, and ask the witness to repeat it, and such was not the case here. The attorney had not abused his privilege, nor, as it appears from the record, unnecessarily consumed the time of the court in a fruitless attempt at cross-examination. And it is not a sufficient reason to refuse cross-examination respecting what has been testified to by a witness that he has already testified upon that subject. The strict application of the rule applied by the circuit court would prevent counsel from ascertaining the truth of the statements made by a witness by a cross-examination.

The defendants' counsel prepared and requested the court to submit the following special questions to the jury:

"1. Did Heavenrich Bros. advance $300 to Karpeles at the time of receiving the mortgage as a consideration for obtaining the mortgage?

"2. Did Heavenrich Bros. at the time of receiving the

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mortgage know that Karpeles had purchased goods or was indebted to plaintiffs?

"3. Did Heavenrich Bros. agree with Karpeles to take up the Hess notes before they were due, in consideration of Karpeles giving them the mortgage?

"4. If you answer 'Yes,' did they know that Karpeles had bought these goods at the time of making such agreement, and the acceptance by them of their mortgage?

"5. Did they pay these notes before they were due?"

The record proceeds:

"The court handed the special questions to Mr. Griffin, who proceeded to argue the same to the jury, and stated to them how they should be severally answered by them, against the objection of Mr. Sloman. The objection was overruled, and an exception taken."

The court, after charging the jury, refused to submit any questions to them, to which ruling counsel excepted. These exceptions raise two questions:

1. Is it proper for counsel to make an argument to the jury upon special questions submitted, and to instruct the jury how to answer them?

2. Is it proper for the court to refuse to submit any questions to the jury which are within the issues to be tried, and proper in form and substance?

Upon the first question, there can be no objection to the questions being submitted to the inspection of the opposite counsel. It is possible that counsel would desire also to frame questions to be submitted to the jury, and he would have the right to do so, and he might request the court if the jury should find a general verdict against his client to instruct the jury to answer such questions. I do not think it is proper for counsel to instruct the jury how to answer such questions. Counsel are not obliged to furnish special questions until after the arguments are closed, but if they do so there is no reason why they should not be discussed if they relate to the merits of the controversy.

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Upon the second exception last above noted, the statute[1] is imperative that the court shall submit the special questions to the jury; and if they are proper in form and substance it would be error to refuse to submit them.

It may be remarked here that the third, fourth, and fifth questions were immaterial, and a refusal to submit them to the jury under the issues in this case was not error; and as to the other two special questions no prejudicial error has been committed in this case in refusing to submit them, if the court was correct in his instructions to the jury upon the law of the case, which were as follows:

"On November 16, 1889, defendant Samuel Karpeles executed to the defendant Herman C. Fechheimer a chattel mortgage on his stock at No. 83 Woodward avenue, to secure certain alleged indebtedness mentioned in the mortgage. On the same day, and about the same time, Karpeles also executed to Heavenrich Bros. a chattel mortgage upon the store to secure certain alleged indebtedness stated in that mortgage. Some of this indebtedness was absolute and some was contingent; but, whether absolute or contingent, the defendants Fechheimer and Heavenrich claim to have paid for it. The details of the indebtedness are not important. It is confessed to be for debts existing at the time the mortgages were given, or what is known in law as a precedent debt, except $192, claimed to have been advanced by Fechheimer at the time of the giving of the mortgage, and the four hundred dollar note to Mr. Karpeles, and the two hundred dollar note to Mrs. Grossman for an amount which Fechheimer assumed at the time of the mortgage, and some $300 which Heavenrich Bros. advanced at the time of the giving of the mortgage. So far as the alleged advances are concerned, the evidence of Fechheimer and Heavenrich show that they have been more than repaid for those advances. The precedent indebtedness does not put defendants Fechheimer and Heavenrich in any better position than Karpeles himself stood. They are not

[1] 8 How. Stat. § 7606.

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aided in this respect by these advances they have made, because the advances have been repaid by the amount they received on the sale of this property from the foreclosure of those mortgages. The case stands, therefore, at this time, as though Karpeles were still the defendant, as whatever rights the defendants Fechheimer and Heavenrich claim, and their rights thereunder, the mortgage to them does not convey anything which Karpeles himself did not have title to.

"This is my view of the law, gentlemen, and the remaining question for you to determine in this case is whether the goods purchased of the plaintiffs in this case were purchased under such circumstances as warrants the plaintiffs in rescinding the contract and bringing this action of replevin.

"If you find that Karpeles was insolvent at the time he purchased the goods from the plaintiffs, and then knew he was insolvent, and purchased them with a preconceived idea not to pay for them, it was a fraudulent purchase, and the plaintiffs may reclaim their goods; and if he has done so they are entitled to the goods thus reclaimed by the writ of replevin, and your verdict should be in their favor for that amount, provided, as I have stated, that there was fraud in the purchase of the goods in the first instance. If Karpeles was insolvent at the time he purchased the goods, and knew that he was insolvent, and failed to disclose this to the plaintiffs in the case at the time of the purchase, the purchase, under those circumstances, is deemed in law a fraudulent purchase. If he was insolvent, and if he knew he was insolvent, and had no reasonable expectation of paying for the goods when he ordered them, then in law the purchase was a fraudulent one.

"Now, in determining this question, gentlemen, you are to consider all the evidence that has been introduced bearing upon the financial condition of Mr. Karpeles at the time he purchased the goods; what took place at the time of the purchase, and the representations that he made to the commercial agencies; and the fact that, within a short time or a few months after he made the purchase of these goods, he failed for a considerable sum. All of these matters are to be taken into consideration, as bearing upon this claim.

"If your verdict is in favor of the plaintiffs in the case, it will be a general verdict for the plaintiffs and six

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cents damages. If you find in favor of the defendants, then it will be for the value of the goods that were taken under the writ of replevin.

"Of course, the opposite of what I have said is also true; that is, if Mr. Karpeles was not insolvent at the time that he purchased these goods in the ordinary course of business, and intended to pay for them, but through subsequent losses, or something occurring after the purchase of the goods, he was prevented from paying for them, then your verdict should be for the defendants for the amount of these goods taken by the plaintiffs on their writ of replevin, and that is stated to be $530, I think.

"*Mr. Sloman*: Five hundred and twenty, with interest from the time of the taking, making it $568.64.

"*The Court:* Finding for the defendants in this case, as I have said, if you do, your verdict will be for $568.64. That is all I have to say to the jury.

"*Mr. Douglas:* Your honor leaves the requests?

"*The Court:* I will refuse the requests, and refuse to submit any questions to the jury."

The action is replevin, and the issue involves the title of the plaintiffs to the property and their right to its possession at the time the writ was issued. The plaintiffs' claim was that they were the owners of the goods replevied, and were entitled to the immediate possession of them, for the reason that when the defendant Karpeles purchased the goods he was insolvent, and knew himself to be such, and did not at that time intend to pay for them; that they had the right to rescind the contract of sale and reclaim their goods. The defendants Heavenrich Bros. claim that they were innocent mortgagees of the goods covered by their chattel mortgage, and that they stand in the situation and are protected by the rule applicable to *bona fide* purchasers from their vendor, whether he obtained the goods by fraud or not. The counsel for the plaintiffs state in their brief that—

"It may be observed that upon this record there is no question as to the existence of the indebtedness mentioned

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in the Heavenrich mortgage, no question as to the advance of the $300 under the circumstances testified to by Heavenrich, and no question at all as to the validity of the Heavenrich mortgage. The facts are assumed to be as Heavenrich states them, leaving the *bona fide* character of the Heavenrich mortgage, as against the defrauded vendors, a mere question of law."

The court held that as the result of the foreclosure showed that defendants had received more than was sufficient to repay them for the money advanced at the time of giving the mortgage, namely, $300, they stood in no better situation than their mortgagor would have stood had the mortgage never been made and the action were against Karpeles alone. To reach this conclusion, he applies the first money received on the sale to the payment of the advance of $300, which had at that time entitled them to protection as *bona fide* mortgagees, and then, as to the remainder of the consideration, it being for a precedent debt, it is not sufficient to preserve their rights as *bona fide* mortgagees for value. The mortgage to Heavenrich Bros. is said to be valid, and no question whatever was made as to the prior mortgage to Fechheimer, to which the Heavenrich mortgage was subject. There is no fraud alleged or charged against Heavenrich Bros. Under the instructions of the court, it must also be conceded that they were innocent mortgagees and for a valuable consideration; that they advanced in good faith $300 to induce Karpeles to execute the mortgage. If this money had not been advanced, they could not have held the goods as against the defrauded vendors. Was this advance a sufficient new consideration to entitle them to the protection of *bona fide* purchasers to the full extent of their mortgage? If the mortgage had been for just $300, and had covered only the goods sold by plaintiffs to Karpeles, it would have been good as against the plaintiffs. Because the mortgage is for more than $300

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advanced, and is intended to secure pre-existing indebtedness, it is not for that reason invalid. A creditor has a right to obtain security for the pre-existing debt, but his debtor has no right to mortgage goods not his own to secure such indebtedness. If, however, he has, for a new and valuable consideration, mortgaged goods in his possession, which he has obtained under a contract of sale induced by his fraudulent practices, to a party who is ignorant of such fraud, and who acts in good faith, relying upon the ostensible ownership of the goods by the mortgagor before the defrauded vendor has rescinded the contract, such innocent mortgagee may hold the goods against the title of the defrauded vendor, upon the equitable doctrine that, where one of two innocent parties must suffer by the wrongful act or default of another, that one must suffer the loss through whose act or neglect such third party was enabled to commit the wrong. The doctrine is an equitable one, and extends no further than is necessary to protect the innocent party in whose favor it is invoked. Hence it may be truthfully said that it extends in this case no further than to protect Heavenrich Bros. for the $300 advanced. It does not protect Heavenrich Bros. against the Butzel notes because they promised to pay them before maturity. They were already liable on these notes contingently as indorsers, and an executory promise which will not change their situation for the worse is not such a consideration as will bring them within the protection of *bona fide* mortgagees or purchasers. *Dixon v. Hill,* 5 Mich. 404; *Warner v. Whittaker,* 6 Id.133; *Blanchard v. Tyler,* 12 Id. 339, 342; *Stone v. Welling,* 14 Id. 514, 525; *Wormley v. Wormley,* 8 Wheat. 421.

In the case before us the difficulty lies in applying the principle so as to afford protection to the rights of each of the parties. As before stated, had the mortgage not

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covered the goods sold by plaintiffs to Karpeles, the plaintiffs could not have assailed the mortgage successfully. Had it covered only the goods sold by plaintiffs to Karpeles, the plaintiffs could not have assailed the mortgage. All the goods were sold by the mortgagees, the good faith of which sale is not questioned, and such sale failed to produce sufficient to pay the debts secured. There was a deficiency of $3,991.27. The question raised is, does a court of law have any authority for saying to the mortgagee—

"You shall apply the moneys which you received on the sale of the mortgaged goods, first for the payment of the last money advanced, so as to deprive you of your security to that extent for the benefit of the person who enabled your mortgagor to include property in the mortgage which did not belong to him, and which he can reclaim if he sees fit to rescind the contract of sale?"

Does not such application destroy the rule of protection to the *bona fide* mortgagee? The rule is that the mortgage is valid and effectual as against the defrauded vendor; but, under the instructions of the court, it ceases to be valid, and the mortgagee loses his protection, the moment he enforces his security. The rule in equity as to the application of payments is that the debtor may direct when he makes a payment how it shall be applied. If he fails or neglects to do so, then the creditor may make the application, and, if both neglect, then the payment will in equity be applied to the debt first incurred, for the reason that this is presumed to be for the best interests of the debtor; but in cases like this neither law nor equity will favor the defrauded vendor at the expense or injury of the *bona fide* purchaser or mortgagee, whose equities are superior to such vendor. Had there been a surplus realized from the mortgage sale, then other considerations would have arisen, which do not arise in this case.

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The main trouble with the plaintiffs' case is that they concede the validity of the mortgage, and that Heavenrich Bros. are *bona fide* mortgagees to the extent of $300. This being so, the rights of Heavenrich Bros., as *bona fide* mortgagees, extended to every part and parcel of the goods covered by the mortgage. They had taken possession of all the goods, and held them by virtue of such mortgage. Their possession was lawful, and as between plaintiffs and them they occupied the position of *bona fide* mortgagees. If their superior right could be terminated by payment afterwards, which under the facts of this case I do not concede, it was not terminated until payment, and hence plaintiffs were not entitled to the possession of the property at the time suit was brought. This suit was premature; and, indeed, I do not see clearly how the rights of the plaintiffs in cases like this can be worked out and protected in a suit at law. It appears from the record that the value of the plaintiffs' goods included in the mortgage was $500, and that the amount for which the defendants Heavenrich were entitled to protection was $300. Had the property been left in the hands of Heavenrich Bros., there would have been $200 worth of goods which justly belonged to the plaintiffs, if they were defrauded as they claim in the sale of the goods to Karpeles; but there is no way at law in which this surplus can be selected out and handed over to the plaintiffs. Until a sale is made, it cannot be known what the goods would bring, and this $500 worth claimed in this suit may upon a foreclosure have brought no more than sufficient to pay the $300. It seems to me that the proper forum to adjudicate upon and protect the rights of the parties in such a case as this would be in a court of equity, under whose guidance the property claimed may be identified, separated, and applied to the discharge of the debt, viz., the

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new consideration for which it was security, and the surplus handed over to the owners, in case the whole security should be more than sufficient to discharge the debt for which it was pledged. There may arise cases where the new consideration for which the security was given was not money. In such cases, in a court of law there would be no criterion to fix the value of such consideration, and a court of equity would be the proper forum. It is possible in some cases, where the new consideration is inconsiderable in comparison with the value of the goods out of which the owner was defrauded, and was money advanced, the defrauded vendor might, by making tender of such new consideration to the mortgagee, relieve the property from the operation of the rule before referred to, and entitle him to bring his action therefor in a court of law.

No exception was alleged or relied upon at the trial upon the ground that the plaintiffs were not entitled to the possession of the goods at the time they sued out the writ, and we should not have reversed the case upon that ground if it had been the only error that we discovered in the record.

It is also claimed by counsel for Heavenrich Bros. that the court erred in his charge to the jury with respect to the main branch of plaintiffs' claim, viz., that the goods were purchased by Karpeles when insolvent and he knew himself to be so, and with the preconceived design not to pay for them. It will be noticed that the court instructed the jury that—

"If Karpeles was insolvent at the time he purchased the goods, and knew that he was insolvent, and failed to disclose this to the plaintiffs in the case at the time of the purchase, the purchase, under those circumstances, is deemed in law a fraudulent purchase."

We think the court erred in this instruction. There

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are some authorities which support the view of the law stated by the court, but the weight of authority is the other way; that it does not render a purchase fraudulent simply from the fact that the purchaser knew at the time that he was insolvent, and failed to disclose that fact to his vendor. It is necessary, in order to make his purchase fraudulent, that he should at the time he purchased the goods intend not to pay for them. The law in this State is laid down in *Shipman v. Seymour*, 40 Mich. 274, 283, and the authorities cited. See, also, *Garbutt v. Bank*, 22 Wis. 384; *Nichols v. Pinner*, 18 N. Y. 295.

We think also that the court erred in stating to the jury that they were at liberty, in reaching a conclusion as to whether the purchase was a fraudulent one, to take into consideration the representations that Karpeles made to the commercial agency. There was evidence introduced tending to show that in February, 1889, he had made a statement to a commercial agency in Detroit of the amount of his indebtedness; but it was not claimed that he made any representations as to the amount of his assets, and it was not shown that these representations, whatever they were, were communicated to plaintiffs, and relied upon by them in making the sale of the goods in question. Some testimony upon that subject was introduced, but it turned out to be entirely hearsay, and was stricken out by the court. It ought, therefore, not to have been considered by the jury as having any tendency to prove the intention of Karpeles in the following July, in giving an order for the goods in question,—that he had formed a preconceived design or intent not to pay for such goods.

The counsel for the defendants Heavenrich Bros. requested the court to charge the jury that—

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"Fraud is not presumed, but must be proved, and the burden of proving fraud is upon the person charging it."

The court made no allusion to this in his instructions to the jury. I think the defendants were entitled to have the instruction given, under the circumstances in this case.

For the errors disclosed upon the record the judgment is reversed, and a new trial ordered.

The other Justices concurred.

ANN HOLMES v. JOHN R. WOOD.

Landlord and tenant—Tenancy at will—Notice—Pleading.

1. In a suit to recover rent, it was admitted that a fixed rental was agreed upon, payable monthly, but the parties differed as to the *term* of the lease, the lessor testifying that it was for one year, and the lessee that no definite time was agreed upon. The lessee further testified that he told the lessor that he could not tell how long he would keep the house, as he did not know himself, but, if it suited him, and nothing occurred, he would probably stay in that locality three or four years, as he wished his children to attend a school near by. And it is held that the lessee was, upon his own showing, a tenant at will, paying rent monthly, and that he could not vacate the premises without a month's notice, as provided by 8 How. Stat. § 5774.
2. Notice must be given of a defense of non-tenantability in a suit to recover rent for the use of a dwelling-house.
3. Such a defense is not made out where the lessor had no notice that the house was claimed to be untenantable, and the tenant assigned other reasons for leaving the premises in his notice of removal, and, while testifying to the presence of bad odors, arising from the alleged want of repairs, did not testify that he left the house on that account.

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Error to Wayne. (Gartner, J.) Argued October 27, 1891. Decided November 20, 1891.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

George H. Chaffin, for appellant.

James H. Pound, for defendant.

MORSE, J. Plaintiff brought this suit in justice's court for the rent of a house for the month of February, 1890, where she recovered a judgment for $33 and costs. Defendant appealed to the circuit, and there prevailed.

There is no dispute but that defendant rented the house, commencing on the 1st day of May, 1889, at $33 per month, payable on the 15th day of each month. The plaintiff claims that the agreement was for a year at this rate. The defendant testifies that the contract was that he should pay $33 a month; that he told her that he could not tell how long he would keep it, as he did not know himself, but, if the house suited him, and nothing occurred, he would probably stay in that locality three or four years, as he wished his children to attend the Cass school; that no time was fixed for which he should rent it. Wood occupied the premises until the 31st day of January, 1890, when he removed therefrom, having previously sent plaintiff a letter on the 21st of January, 1890, notifying her that he was going to do so. On the day that he left the premises he sent by his son the key of the house, with a letter in a sealed envelope, to the plaintiff, who refused to receive it. On the 8th of March, 1890, she sent for the key, and it was delivered to her.

Wood also claimed on the trial that plaintiff agreed

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to make all necessary repairs, but refused to do so, and that the sewerage from the closet bath-room was defective, and the odor was so bad that it affected the health of his family. Plaintiff denied that she ever agreed to make any repairs, but testified that she did so whenever requested.

The court instructed the jury that if they found the agreement, as plaintiff contended, a letting for a year, she was entitled to recover the rent for one month, unless the premises were untenantable because of sewer-gas escaping, and were not reasonably fit and suitable for the purpose for which they were rented, to wit, a dwelling-house; that, if the house was not suitable and fit for a dwelling, the defendant could surrender his lease at any time, and quit the building; that, if the jury believed the contract was as Wood stated, the defendant was entitled to a verdict. The instructions were erroneous.

1. Wood, by his own showing, was a tenant at will, paying rent monthly. *Hilsendegen v. Scheich*, 55 Mich. 468. He could not vacate the premises without a month's notice to plaintiff. 3 How. Stat. § 5774.[1] The notice being given on the 21st day of January, the plaintiff was entitled to the rent until and including the 21st day of February, under the same statute, which provides that the tenancy in such cases shall be determined "at the end of a period equal in time to that in which the rent is made payable," which in this case would be one month from the 21st day of January. The rent having been paid up to the 1st of February, the plaintiff was entitled to 21 days' rent.

2. The plea in this case was the general issue. There was no notice given under such issue by the defendant

[1] See *Huntington v. Parkhurst*, 87 Mich. 45, 46, and cases cited, where this section of the statute is discussed.

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that the house was not tenantable as a dwelling, and it could not be interposed without such notice. No objection to the making of this defense, however, seems to have been urged on the trial. But there was not a sufficient showing in support of this defense to warrant its submission to the jury. The plaintiff had no notice that the house was claimed to be untenantable, and the reason assigned by the defendant in his notice for leaving the premises was as follows:

"Having to move my down-town office February 1, I have decided to move into larger quarters, and have it all together."

Neither Wood nor his wife, who were examined as witnesses, although complaining about the bad odor, arising from the alleged want of repairs, testified that they left the house on that account.

Judgment reversed, and a new trial granted, with costs of this Court to plaintiff.

The other Justices concurred.

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SHERWOOD HALL v. EDWIN A. BURLINGAME, JUDGE OF THE SUPERIOR COURT OF GRAND RAPIDS.

Constitutional law—State troops—Exemption from jury duty.

Act No. 150, Laws of 1881 (How. Stat. § 978), entitled "An act to provide for the enrollment of contributing members in each company and battery of State troops," and which exempts such members from jury duty, is constitutional.

Certiorari to review the action of respondent in adjudging petitioner guilty of contempt in refusing to be sworn

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and to serve as a juror, said petitioner basing his refusal upon the ground that he is a contributing member of Company B, Michigan State Troops. Argued November 11, 1891. Petitioner discharged November 20, 1891. The facts are sufficiently stated in the opinion.

McGarry & McKnight, for petitioner.

A. A. Ellis, Attorney General, for respondent.

GRANT, J. The sole question in this case is the validity of Act No. 150, Laws of 1881, being section 978, How. Stat. The act is entitled—

"An act to provide for the enrollment of contributing members in each company and battery of State troops."

The act provides for the enrollment of not more than 150 members in each company and battery. Each of such members must pay into the treasury of the organization annually not less than $10. Upon the payment the contributing member is entitled to a certificate from the commanding officer, countersigned by the secretary. Upon compliance with these terms, such member is exempt from jury duty and poll-tax the ensuing year. The fund derived from this source must be accounted for and used in accordance with regulations prescribed by the State military board.

The validity of this act is attacked for the following reasons:

1. That it is contrary to article 4, § 20, of the Constitution, which says: "No law shall embrace more than one object, which shall be expressed in its title."
2. That it confers upon military officers the power of arbitrarily setting aside the authority of the courts to compel the attendance of qualified jurors.
3. That it transfers from the Legislature to military officers the power to determine exemptions from jury duty.

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4. That the opportunity for exemption is so limited as to make it class legislation.

5. That it is against public policy, no public reason existing for such exemption.

Legislative enactments will not be construed in a narrow or technical sense. The details of an act need not be set forth in the title. The provisions of the act must be germane to the title, and tend to the accomplishment of the purpose stated in it. *In re Mayer*, 50 N. Y. 504. The enrollment of contributing members is the object of the act, and not an incident, as is urged in behalf of the respondent. The condition of the enrollment is the payment of money. The inducement thus to enroll is the exemption from jury duty and poll-tax. It must have been in contemplation of the Legislature to offer some inducement to citizens to become contributing members of these organizations. The mischief to be avoided by this provision of the Constitution could not well be accomplished under the title to this act, because the attention of the members of the Legislature would evidently be called to the conditions upon which citizens should enroll themselves, and the privileges they should receive in so doing. Any military organization could provide for admitting contributing members without an act of the Legislature, but would not, of course, possess the power to exempt such members from any duty imposed upon them by law. There would be no occasion for an act of the Legislature to provide for such enrollment unless some privileges were to be granted to those enrolling which they could not otherwise have.

We think the other objections urged against the validity of the act are not valid. The Legislature has seen fit to exempt many from jury duty. Among them are teachers, ministers of the gospel, officers of colleges,

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superintendents and engineers of railroads, ferry-men, members of fire companies, and others. When any such citizen is summoned as a juror, he must produce proof satisfactory to the court that he comes within the exemptions. No power is conferred upon military officers to exempt from jury duty any more than is conferred upon fire companies and the like. When the citizen has complied with the act, he is then made exempt by law. The law, not military officers, fixes the exemption.

This act cannot be characterized as class legislation. Any citizen, no matter what his occupation or business, is entitled to the exemption until the number is filled. It is the policy of the law to foster the organization of State troops, and it cannot be characterized as class legislation to grant to a citizen who is able and willing to contribute to such organizations the privileges provided by this act. The exemption of 150 citizens to each organization, if so many choose to avail themselves of the provisions of this law, does not interfere with the right of trial by jury nor prevent a fair and impartial trial by jury.

It is the province of the Legislature to determine the qualifications of jurors, and to provide who shall be exempt. It is not the province of the courts to say that these exemptions, or any of them, are against public policy, so long as the right of trial by jury is maintained. This duty belongs to the Legislature, a co-ordinate branch of the government. With the wisdom of such exemptions courts are not concerned. When the Legislature has acted within its jurisdiction, the other co-ordinate branches of the government have no constitutional right to interfere.

The contempt proceedings must be quashed, and petitioner discharged.

The other Justices concurred.

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THOMAS EVANS v. THE LAKE SHORE & MICHIGAN SOUTHERN RAILROAD COMPANY AND THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY.

Railroad companies—Absence of gate-man from place of duty—Contributory negligence.

1. This case comes clearly within the principles laid down in *Richmond v. Railway Co.*, 87 Mich. 374, and should have been submitted to the jury.
2. When gates are provided by railroad companies at street crossings, the public have a right, the gates being open, to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duties, and are not negligent in acting upon the presumption that they are not exposed to a danger which could only arise from a disregard of such duties.
3. Plaintiff, a street-car driver, who was injured at a railroad crossing, testified that he was signaled to "come on" by one whom he supposed to be the gate-keeper, but who was not a servant of the railroad company, and who denied giving such signal, and testified that he warned plaintiff not to attempt to make the crossing. The gate was open at the time, and the gate-keeper was temporarily absent for the purpose of attending a switch near by. And it is held that the conduct of the stranger, as found by the jury from the conflicting testimony, was proper to be considered by them as bearing upon plaintiff's contributory negligence; that an open gate would not excuse plaintiff's advance upon the crossing in the face of a signal of danger or the protests of a by-stander; and that an assurance of safety, although given by a stranger, would be entitled to consideration and weight in explanation of the conduct of one to whom such assurance was given.

Error to Wayne. (Brevoort, J.) Argued October 14, 1891. Decided November 20, 1891.

Negligence case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

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Corliss, Andrus & Leete, for appellant, contented:

1. If a servant requests another person to do his duty, or assist him therein, the master is liable for any injury resulting from such person's acts; citing Wood, Mast. & Serv. § 308; *Althorf v. Wolfe*, 22 N. Y. 355; *Simons v. Monier*, 29 Barb. 419; *James v. Muehlebach*, 34 Mo. App. 512.
2. The absence of the gate-man was gross negligence on the part of defendant; citing *Railroad Co. v. Dunn*, 78 Ill. 197; and where parties approaching the crossing exercise due care, the company is liable for any injury arising from the negligence of the gate-man; citing *Dolan v. Canal Co.*, 71 N. Y. 285; *Kissenger v. Railroad Co.*, 56 Id. 538.
3. The case of *Richmond v. Railway Co.*, 87 Mich. 374, conclusively establishes the right of plaintiff to have the facts submitted to the jury.

A. C. Angell, for defendant Lake Shore & Michigan Southern Railroad Company, contended:

1. If the plaintiff was guilty of contributory negligence, the action of the court was not erroneous; citing *Eakins v. White Bronze Co.*, 75 Mich. 568.
2. There is no evidence that Hurley was defendants' servant:

a—Dilworth was a servant of subordinate character, and had no authority to employ Hurley, and no one else employed him. He owed no duty to the defendants, nor had they any control of him. A master is not liable, as for a servant's act, for the conduct of one whom he has not employed, or to whose employment he has not consented; citing *Mangan v. Foley*, 33 Mo. App. 250; *Jewell v. Railway Co.*, 55 N. H. 84.

b—Hurley was in no sense a servant unless he did what he did because some one representing the defendants asked him to do it. His own testimony is clear that he did not hear Dilworth ask him to stop the car; that he acted as a volunteer. The cases first cited by plaintiff's counsel are not in point. *Althorf v. Wolfe*, 22 N. Y. 355, was a case where the assistant was working with the servant at his request, and doing exactly the same thing, and *Simons v. Monier*, 29 Barb. 419, was one where a servant, instead of setting fire to some brush, directed his son to do that precise act; and in *James v. Muehlebach*, 34 Mo. App. 512, the very point insisted on by us is emphasised, the master being held not liable for the act of the servant's assistant, unless the assistance was rendered merely by reason of the servant's wish and desire.

c—Even if Dilworth had authority to employ Hurley to stop

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the car,—that is, to do his duty,—and if Hurley had gone because of Dilworth's request, still, on the plaintiff's testimony, Hurley deliberately endeavored not to stop, but to hasten, the car. Upon no theory can he be held a servant for that purpose. The liability of the master for the disobedient conduct of a servant he has selected can hardly be stretched to cover this case.

3. Again, if Hurley were on any theory defendant's servant, his conduct cannot justify plaintiff's needless recklessness in approaching the gate as he did. The statute of 1889 (3 How. Stat. § 3565c), the rules of the street-car company, the city ordinance, and common experience all required that, whatever signal was given him, plaintiff should, when he could do so with perfect ease and security, have approached the gate under such control that he could be governed by what his senses would have then disclosed to him. His duty to his passengers, if not to himself, demanded this.

L. C. Stanley, for defendant Detroit, Grand Haven & Milwaukee Railway Company.

McGRATH, J. This is an action on the case for negligence.

Defendants' road crosses Croghan street about 300 feet east of Orleans street, in the city of Detroit, at grade. The southerly side of the street, west of the track, is occupied by frame dwelling-houses, two stories high, built close together, and flush with the southerly line of Croghan street; and the most easterly house is about 40 feet from the westerly track. Cars going north on defendants' track climb a heavy grade. A gate-keeper and drop-gate are maintained by defendants at the crossing. A street railway is operated on Croghan street. Plaintiff claimed that, while driving easterly upon one of the street-cars, he stopped his car at Orleans street, to allow a passenger to alight; that in approaching the crossing the street-car conductor usually jumped off, and ran forward to the crossing, and signaled him whether to come on or stop; that in this instance the conductor went forward as usual, and plaintiff turned on the brake to check his car,

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so as to give the conductor time to report; that, as he did so, one Hurley, who was at the gate, and whom plaintiff supposed to be the gate-man, beckoned him to come on, and he turned off the brake, and started forward; that it was quite usual for the gate-keeper to signal him as he approached the crossing; that he could not see any distance south of Croghan on defendants' tracks until his horses had passed the last dwelling on the south side of the street; that the grade of the street at the tracks is considerably lower than it is 40 feet west of the crossing; that, as he approached the crossing, Hurley called out to him to hurry up, and he started up his horses; that he had no knowledge or warning of the approach of cars until the heads of his horses were within a few feet of the tracks; that when he discovered the train he was too late to stop his car, and the only course open was to get across before the engine; that, as he attempted this, a locomotive with tender attached, going north, tender first, struck the rear part of his car, killing one passenger, injuring others, and seriously injuring plaintiff; that the engine was running at a rate of speed prohibited by the city ordinances; that the gate was open at the crossing, and no whistle or bell was sounded.

Defendants claimed that the whistle was blown, and that the locomotive had a steam bell attached; that Hurley was not the gate-man or their agent; that the gate-man and Hurley were together in the gate-keeper's shanty when the engineer of the approaching locomotive whistled for a switch, which was north of and near the crossing; that the gate-man and Hurley then came out of the shanty, the former going to open the switch, and the latter going to the locality of the drop-gate. The gate-man says that he told Hurley to attend the gate or look out for the street-cars; but Hurley says that he received no instructions from the gate-man, denies that he signaled the plaintiff

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to come on, and claims that he would have dropped the gate, but did not do so because the horses were in the way when he thought of it. The gate stood 38 feet west of the tracks.

The court submitted the case to the jury, but after the jury had retired, and it became evident that they could not agree, the jury were recalled, and directed by the court, upon its own motion, to bring in a verdict for defendants.

The court erred in directing a verdict. The case comes clearly within the principles laid down in *Richmond v. Railway Co.*, 87 Mich. 374. In that case there was no gate, but there was a flagman, whose duty it was to notify the public of approaching trains. He was in the shanty, and ran out too late to avert the collision. It was shown that he could be seen sitting in the shanty from the street-car. In the present case there was a gate, which was open, and thereat a person, who not only did not close it, but who, it is claimed, signaled the plaintiff to come on; in other words, assured him that it was safe to cross the railroad tracks. The testimony tended to show that the gate-man had up to this time been present at his post, and that usually, when trains were approaching, the gate was closed, or dropped across the street-car tracks. The gate-keeper was clearly negligent in leaving his post, knowing that the engine was approaching the crossing, without closing the gate, or giving some signal of danger. It has been frequently held that when gates are provided the public have a right, the gates being open, to presume, in the absence of knowledge to the contrary, that the gate-men were properly discharging their duties, and that it was not negligence on their part to act on the presumption that they were not exposed to a danger which could only arise from a disregard of their duties by the gate-men. *Glushing v. Sharp*, 96 N. Y. 676; *Railway Co. v.*

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Schneider, 45 Ohio St. 678 (17 N. E. Rep. 321). It is urged that gate-men cannot be present at all times; but the gate is always present, and, when open, it tends to assure the public of the absence of danger. Railroad companies can protect themselves and the public by closing the gate in the temporary absence of the gate-man.

In the present case it is urged that Hurley was not a servant of the defendants, and hence defendants are not responsible for his act in assuring plaintiff that it was safe to cross. Conceding that Hurley was not the servant of the company, and was a mere by-stander, his conduct bears upon the question of the contributory negligence of the plaintiff. It is one of the circumstances properly to be considered by the jury in determining that question. If, as he claims, he did not signal plaintiff to come on, but did signal him to stop, the jury would be entitled to consider that fact in determining the question of plaintiff's negligence, and its weight would not be materially affected by the fact that he was not the servant of the company. Hurley occupied the place usually occupied by the gate-man. His presence there, the plaintiff's belief that he was the gate-man, his conduct there, and the open gate, are all circumstances to be considered by the jury in determining the question of plaintiff's negligence. An open gate would not excuse plaintiff's advance upon the crossing in the face of a signal of danger, or the protests of a by-stander; and an assurance of safety, although given by a stranger, is entitled to consideration and weight in explanation of the conduct of one to whom the assurance is given.

It is insisted that the testimony tends to show that the rules of the street-car company provided that, before attempting to cross the tracks, the driver should stop the car, and wait until the conductor should go ahead and see that it was safe to cross; that the driver did not

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observe this rule, and was therefore guilty of negligence, and cannot recover. A careful examination of this testimony, and a fair construction of it, will not disclose the existence of such a rule, or testimony tending to establish its existence. The company's orders undoubtedly were, if the gates were up, and no gate-man was present, that the driver should stop, and the conductor should first see that it was safe to cross; but, if the gate was not closed, and the gate-man was present and signaled them to come on, such signal was to be considered as an assurance of safety, and they were to go on. This was the testimony of the plaintiff, the conductor, and of other witnesses. Upon this point it is only necessary to quote an extract from the testimony of G. S. Hazard, the superintendent of the street railway company, who says:

"The order of my company was for the men to see that the way was clear before they crossed. That was the written order they had; so that, whenever the gate-man gave them the right of way, by either telling them or directing them to proceed, it was our instructions to rely upon his order. The instructions were, if the man at the gate waved them to come on, to go on. At that time there were no instructions to get down to run ahead; but the instructions were to see that the way was clear, and, if he waved them on, to go on. We do not now depend upon anybody but ourselves. Everybody runs ahead. But at that time we were relying upon the railroad. * * * We depended upon the day watchman for safety."

It is urged that the man at the gate told the driver to "hurry up," and that that of itself was a warning; but this was after the gate-man had beckoned the driver to come on, after the driver had started up the horses, after he had reached the line of defendants' right of way, on a down grade, and before either driver or conductor had seen the engine approaching. It cannot be presumed that

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the driver was possessed of the same knowledge as was possessed by the gate-man. In determining the question of plaintiff's negligence, all the circumstances must be considered. The facts disclosed by this record respecting plaintiff's conduct were not such as to warrant the court in determining as a matter of law that plaintiff was guilty of contributory negligence. That matter should have been submitted to the jury.

Respecting defendants' negligence, the act which induced plaintiff to approach the crossing without the usual precautions was not necessary to sustain the charge. Their negligence was established by the showing as to what they failed to do. If they failed to close the gate, and to warn plaintiff of the danger, a case was made out, and plaintiff was entitled to recover, unless plaintiff was shown to have been negligent. If plaintiff was warned not to approach the crossing, and the warning was of such a nature that an ordinarily watchful and prudent person could have seen and understood it, and plaintiff did not heed it, but drove upon the tracks in the face of it, he was guilty of contributory negligence, and cannot recover. If, however, the plaintiff was assured by a signal from any person, whether he was a servant of defendants or a stranger, that it was safe to cross, that circumstance is entitled to be considered by the jury as excusing his failure to observe the precautions ordinarily taken, especially as the person giving the signal occupied the place usually occupied by the gate-keeper, and plaintiff believed him to be the gate-keeper.

In view of what has been already said, it is unnecessary to discuss the instructions given to the jury before they were recalled.

The judgment is reversed, and a new trial ordered, with costs.

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MORSE and LONG, JJ., concurred with MCGRATH, J.

CHAMPLIN, C. J., concurred in the result.

GRANT, J. *(dissenting).* I cannot concur in the conclusion reached by my brethren. The following facts are established by the plaintiff's case:

1. Plaintiff was familiar with the crossing, and had for some time crossed it 16 times a day. Thirty-eight regular trains passed each day, besides switch trains. He knew that one was liable to come at any moment; that there was a slight descent between the gate and the track; and that the street railway track was wet, thus rendering it more difficult to stop the car.

2. On reaching a point 41 feet from the track he could see the engine 700 feet away.

3. He approached this point at a high rate of speed.

4. The rules of the street-railway company, in whose employ plaintiff was, required their employés to see that the way was clear before they crossed. It appears that written instructions were given, but these were not produced. The conductor, who was with the plaintiff at the time of the accident, says: "The orders were, when we came to that crossing to have the cars slack down, and the conductor run ahead, and see if the way was clear." It is to be regretted that these instructions, being in writing, were not produced, so as to remove all doubt as to what they were. Mr. Hazard, the superintendent of the street-railway company, testified upon this point as follows:

"The order of my company was for the men to see that the way was clear before they crossed. That was the written order they had; so that, whenever the gateman gave them the the right of way, by either telling them or directing them to proceed, it was our instructions to rely upon his order. The instructions were, if

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the man at the gate waved them to come on, to go on. At that time there were no instructions to get down and run ahead; but the instructions were to see that the way was clear, and, if he waved them on, to go on. We do not now depend upon anybody but ourselves. Everybody runs ahead."

On cross-examination he testified as follows:

"There was a written order on the time-table; a time-table put up; and there was an order saying, if the way was clear before attempting to cross— That is, the order that was on the time-table; also on the time-table that was written. There were sometimes—not then, before that time—there were times there that there was no watchman there at all, and during the day sometimes a watchman had to step out for something, and we see the order was given in case they did not see him there, or he was not there and waved them on, it was the order to see that the way was clear before attempting to cross; that is what was meant. The matter of the watchman beckoning came up. Probably some of the men asked me in case he motioned ahead to go ahead, and I told them, 'Why, yes.'"

He further testified that he did not remember of having said to Mr. Evans to go ahead if the watchman beckoned, nor could he remember any particular one to whom he made such statement. He says: "I know some of them have spoken to me about it. I know I have said so to some of them." It is very significant, as bearing upon the question of these instructions and the conduct of the plaintiff, that the conductor on this occasion jumped from the car at the usual place for the purpose of running ahead and ascertaining if the track was clear; but the horses were going nearly as fast as he could run. He succeeded in getting nearly abreast of the horses' heads, when he saw the engine approaching, and hallooed to the driver to stop. The testimony of Mr. Hazard, above quoted, is very indefinite. It is very difficult to determine from it just what he means. It is certain, however, from his testimony, that there was imminent

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danger in crossing this place, and that special instructions were given to their employés for the purpose of avoiding it. Under his own testimony, how could the conductor and driver see if the way was clear before they crossed, except by going sufficiently near the track and looking? Plaintiff says that he received instructions in regard to this crossing from his employer, but does not state what those instructions were.

5. The gates were up, and the gate-man, plaintiff knew, was not there.

6. The accident would have been avoided if the plaintiff had approached the crossing with his horses upon a walk.

7. The only excuse given by plaintiff for not approaching this dangerous place with his horses under control is that Hurley, who did not represent either of the defendants, and was not in their employ, motioned to him to go ahead, and hallooed to him to hurry up. Plaintiff testifies that, if a stranger had waved to him, and said, "Hurry up," he would have gone across without stopping or looking. This is precisely what he did do in this case. It is difficult to imagine a case where common prudence required greater care of a street-car driver than in the present one. He had no right to rely upon the signal from a stranger, and if it be a fact that this stranger called him to hurry up, and stood at the gate motioning him forward, this of itself was a warning that there was danger approaching. The safety and lives of passengers were under his control in approaching this most dangerous place, and a proper regard for the safety of his passengers and of himself required him to approach this crossing with his horses under control. I think the plaintiff was not only guilty of negligence, but that his negligence approached to recklessness. In my judgment, a common and proper regard for the safety of those

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traveling upon street railways or in the street-cars repudiates a rule which sanctions such blind reliance as plaintiff displayed in this case, and permits him to rush into danger without any actual knowledge of the situation, which he might easily and readily have obtained, and thus avoided the accident. I do not think this case comes within the rule of *Richmond v. Railway Co.* There the driver was approaching the crossing upon a walk.

Judgment should be affirmed.

THE PEOPLE v. AUGUSTUS BANE.

Evidence—Opinions.

1. In a suit involving the question whether a horse was afflicted with the disease known as "blind staggers" or not, a witness who saw the horse while suffering from an attack of said disease, as claimed, and who testifies to having had considerable experience with horses, and to having seen several who had the disease in question, which is common among horses, and with the symptoms of which he is familiar, is competent to give an opinion upon the disputed question.
2. A respondent on trial for cruelly mutilating a horse, and whose defense was that the animal had the blind staggers, for which bleeding was the usual remedy, called as a witness a veterinary surgeon, who, having stated on cross-examination that the respondent had described to him how the horse acted, was asked to give his opinion from the statements made whether the horse had the blind staggers or not. And it is held that it would have been proper to have given to the witness the conduct of the horse as stated by the respondent, and to have asked him if, in his opinion, the horse was afflicted with the disease; and that it was also competent to predicate the question upon the actions of the horse as described to the witness by the respondent.

Exceptions before judgment from Muskegon. (Dicker-

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man, J.) Submitted on briefs November 11, 1891. Decided November 20, 1891.

Respondent was convicted of cruelly mutilating a horse. Conviction affirmed. The facts are stated in the opinion.

Arthur Jones, for respondent.

A. A. Ellis, Attorney General, and *Willard J. Turner*, Prosecuting Attorney, for the people.

McGRATH, J. Respondent was complained against before a justice of the peace, under How. Stat. § 9391, for cruelly mutilating a certain horse by slitting his ear, and otherwise cutting said horse with a knife. He was convicted, and appealed to the circuit, where he was again convicted, and comes here on exceptions before sentence.

The testimony tended to show that respondent had hitched the horse to a buggy in a hotel barn; that the horse refused to start when told, threw its head, and fell upon the floor, whereupon respondent jumped out of the buggy, and angrily plunged the blade of his pocket-knife into the roof of the horse's mouth; that, the horse still refusing to go, the same thing was twice repeated; that, because he still refused to go, respondent cut a slit from one and a half to two inches and a half in length in the horse's ear; that, being then unable to start the horse, respondent jumped out and cut a slit about three inches in length in one of the animal's fore-legs; that the horse bled freely with each cutting; that when asked by the officer, who then appeared upon the scene, what was going on, respondent replied, "I am putting my mark on this damned horse;" that respondent was under the influence of liquor at the time, and, in the course of the conduct described, said, addressing the

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horse, "Damn you, if you get the start of me, it will be the first horse that ever did;" that immediately after his arrest respondent had given as a reason for his conduct that the horse was balky, and refused to go.

The defense was that the horse had the blind staggers, and that bleeding was the usual remedy.

Several errors are assigned upon the admission of testimony. A witness for the people, who was present at the time of the commission of the offense, was asked the following question:

"What is your opinion, from what you saw of this horse at that time, from your knowledge of horses, as to whether this horse was affected with blind staggers?"

Counsel for defendant objected on the ground that the witness had not shown himself qualified to answer. The objection was overruled, and the testimony admitted. The witness had testified that he had had considerable experience with horses, that he had seen several horses so afflicted, that he was familiar with the symptoms, and that blind staggers was a disease common among horses. There was no error in the ruling of the court.

Defendant called as a witness a veterinary surgeon, and examined him at length as to the symptoms attending this disease. On cross-examination he was asked if respondent had described to him how this horse acted, and the witness replied that he had. The witness was then asked and allowed to answer, under objection, the following question:

"What was your opinion, from what he related to you of the symptoms, of how the horse acted, as to whether the horse had the blind staggers or not?"

The ground of the objection was not stated. It would have been entirely proper to have given to the witness the conduct of the horse as stated by respondent, and then asked whether, in the opinion of the witness, the

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horse was afflicted with that disease; and it was entirely competent to predicate the question upon the actions of the horse as described to the witness by the respondent.

Other errors are assigned upon extracted portions of the court's instructions to the jury, but the court gave all of defendant's requests, and the charge, taken as a whole, correctly stated the law.

There is no error in the record, and the same will be remanded, with instructions to proceed to judgment.

The other Justices concurred.

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THE PEOPLE v. WILLIAM CAHOON.

Criminal law—Misconduct of prosecuting attorney—Evidence.

1. Zeal in a prosecuting attorney is entitled to the highest commendation, but it must be exercised within proper limits.[1]
2. Witnesses are entitled to respectful consideration, and it is the duty of courts to see that they are protected from the insinuations and attacks of counsel, whether direct or in the form of a suggestive question.
3. Juries very properly regard the prosecuting attorney as unprejudiced, impartial, and non-partisan; and insinuations thrown out by him regarding the credibility of witnesses for the defense are calculated to prejudice the respondent.
4. The following questions asked of respondent's wife by the prosecuting attorney on cross-examination, she being the only person present at the affray except the parties thereto, namely:
   a—Is it not a fact that you were not there at all?
   b—Has this been written out?

[1] See, as bearing upon this question, *People v. Dane*, 59 Mich. 550; *People v. Carr*, 64 Id. 702; *People v. O'Brien*, 68 Id. 468; *People v. Vanderhoof*, 71 Id. 159; *People v. Montague*, Id. 447; *People v. Evans*, 72 Id. 368; *People v. Swetland*, 77 Id. 53; *People v. Treat*, Id. 348; *People v. Moyer*, Id. 571; *People v. Welch*, 80 Id. 616; *People v. Hess*, 85 Id. 128.

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c—Is it not a fact that you and your husband have concocted this whole story?

d—You have been a witness for your husband in every lawsuit he has had, have you not?

—Are held to have reflected upon the character of the witness, and to bring this case within the rule laid down in *Sullivan v. Deiter*, 86 Mich. 404.

5. Remarks by a prosecuting attorney, accompanying a request to swear impeaching witnesses whose names are not indorsed on the information, calculated to impress the jury with the belief that the people are prepared to impeach the respondent by his own neighbors, and that, while the procurement of witnesses for that purpose is usually difficult, it is an easy matter in his case, are indefensible, as is his action in recalling the respondent after the refusal of the court to admit the proposed impeaching testimony, and questioning him as to whether he had not been impeached in other cases, and if, in a number of other instances, his neighbors had not been brought into court for the purpose of impeaching him.

6. This case is distinguished from *People v. Partridge*, 86 Mich. 243, for reasons stated in the opinion.

Exceptions before judgment from Jackson. (Peck, J.) Argued November 12, 1891. Decided November 20, 1891.

Respondent was convicted of assault with intent to do great bodily harm less than the crime of murder. Conviction reversed, and new trial ordered. The facts are stated in the opinion.

T. E. Barkworth, for respondent.

A. A. Ellis, Attorney General, and *James A. Parkinson*, Prosecuting Attorney, for the people.

McGRATH, J. From a careful examination of this record it is clear that the defendant has not had a fair and impartial trial.

The information contains two counts. The first sets forth an assault with intent to kill and murder, and the second assault with intent to do great bodily harm. The jury found defendant guilty under the second count.

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It is unnecessary to recite the testimony. The affray occurred upon a haymow in a barn, whither the parties had repaired to divide some hay. After the division of the hay some hot words passed between the parties relative to other deals. Both lived upon the farm; defendant conducting it, and Maybee living in a separate house, and evidently working upon shares. Maybee, the party who claimed to have been assaulted, was the only witness for the prosecution. He insisted that Cahoon was the aggressor. Defendant claimed that he was sick at the time; that Maybee followed him (defendant) around the bin, threatening to attack him, whereupon defendant seized a pitchfork, and told Maybee to keep away from him; that Maybee thereupon rushed at defendant, and in the altercation Maybee fell through the hole through which the hay was fed to the mangers below.

Defendant's wife, knowing that the parties had had trouble, followed them, without the knowledge of either, and at the time of the affray stood upon the stairs leading to the mow, where she could both see and hear. She corroborates her husband in the main, although she gives some incidents which neither Maybee nor her husband mentioned. Upon cross-examination of the wife of the defendant the prosecuting attorney asked the following questions:

"*Q.* Is it not a fact that you were not there at all?
"*A.* It is a fact that I was there.
"*Q.* Has this been written out?
"*A.* No, sir.
"*Q.* Is it not a fact that you and your husband have talked this thing over and over again in the house among yourselves?
"*A.* Yes, sir; we have talked it over.
"*Q.* Is it not a fact that you and your husband have concocted this whole story?
"*A.* No, sir.
"*Mr. Barkworth:* I object, as immaterial and not proper cross-examination.

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"*Q.* You have been a witness for your husband in every lawsuit he has had, have you not?

"*A.* No, I think not.

"*Q.* Is it not a fact that your husband has had a great many lawsuits?

"*A.* Yes, sir; he has had some.

"*Q.* And you have been a witness in every one of them? (Objected to as immaterial. Overruled. Exception taken.)

"*A.* No, sir; I have not."

The following is an extract from the record, after the defendant had rested his case:

"*Mr. Parkinson, Prosecuting Attorney:* Now, your honor, I desire to put some witnesses on the stand. These witnesses are not rebuttal witnesses as to any fact in this case that I have learned at any time. *I want to put these witnesses on to impeach Mr. Cahoon's general reputation for truth and veracity. I intended to do that if Mr. Cahoon went on the stand.* I did not know that Mr. Cahoon was to go on the stand, and therefore had them here as a mere possible contingency. I had no actual knowledge that he was to go on the stand, however, until he was sworn. Of course, I am well aware that rebuttal witnesses should be put on the information, but these witnesses are not rebuttal witnesses to any fact. *These are impeaching witnesses, and as a matter of necessity they must be neighbors, persons acquainted with the respondent, and acquainted with his reputation;* they cannot be strangers; they must be men that he knows; and consequently there can be no cause to say or for claiming surprise.

"*Mr. Barkworth:* Now, your honor, I object to the prosecuting attorney's statement of this matter. His remarks here are improper before this jury, and I desire my exception to these remarks.

"*The Prosecuting Attorney:* I might consume considerable time in discussing this question, but I do not think it necessary. I cannot see how it is possible that witnesses that might be necessary, or that witnesses must be put on the information and subpœnaed on a mere contingency. I am frank to say, your honor, that I never saw the names of these persons until they were handed me on this paper, and I do not think it is possible to put these names on at the time of the filing of the information.

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It is not always that you can make up a list of persons of that kind, although in this case it was easy enough.

"*Mr. Barkworth:* I take an exception to that remark.

"*The Prosecuting Attorney: I did not make that remark because I was claiming that it was difficult to get these witnesses.* I am not putting my request on that ground.

"*Mr. Barkworth:* Please note my exceptions.

"*The Prosecuting Attorney:* And then, supposed I would have furnished a list of these men. I would have been compelled to bring them here. I would have been compelled to have them here, and sit during the entire trial, and perhaps never use them, simply because they were on the information. Now, I insist that there is no rule of law that courts will lay down that I must guess who the defendant's witnesses may be, and place names on the information who might, under any possible contingency, become witnesses. The result would be that a great many times injustice would be done, and we could not try our case. I didn't know until the trial began that we wanted a witness. If that were the rule, the result would be just as it was *with this woman, Mrs. Cahoon, put on the stand without the least intimation that we wanted to rebut any testimony that she could give.* I would have had to guess what she would swear to. Of course, if Mr. Cahoon had not been put on the stand, we would not have needed a witness, and I think the rules of law admit of such contingencies. These witnesses are not to rebut any fact, but simply *to impeach the character of Cahoon as to truth and veracity;* and I do not think the court ought to hold that they must be put on the information.

"*Mr. Barkworth:* I take exceptions to all these remarks.

"(Remarks of court overruling the application of the prosecution.)

"*The Prosecuting Attorney:* I desire to recall Mr. Cahoon.

"*Q.* In cases heretofore is it not a fact that you have been impeached?

"*Mr. Barkworth:* I object to these questions.

"*Q. Is it not a fact that on a trial before Justice Palmer, in legal proceedings since I have been prosecuting attorney, during my other term of office, within the last two years, that five or six times your neighbors came into court to swear that your general reputation was bad? Is that not true?*

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"*Mr. Barkworth:* I object; I object.
"*The Court:* I sustain the objection.
"*Mr. Barkworth:* I take exception to the way the prosecuting attorney puts these questions.
"*The Court:* I don't think that is proper cross-examination.
"*The Prosecuting Attorney:* I have seen that question put.
"*Mr. Barkworth:* I have never seen it put.
"*Q. Mr. Cahoon, is it not true, in legal proceedings, several times, your neighbors have sworn to your general bad reputation?*
"*Mr. Barkworth:* Same objection.
"*The Court:* Sustained."

Zeal in a prosecuting attorney is entitled to the highest commendation, but that zeal must be exercised within proper limits. In civil cases counsel often take too much latitude in the cross-examination of witnesses. Witnesses are entitled to respectful consideration, and it is the duty of courts to see that they are protected from the insinuations and attacks of counsel, whether the insinuation or attack is direct or is in the form of a suggestive question. In criminal cases the prosecuting attorney is a public officer, acting in a *quasi* judicial capacity. Juries very properly regard him as unprejudiced, impartial, and non-partisan; and insinuations thrown out by him regarding the credibility of witnesses for the defense are calculated to prejudice the defendant. Here the prosecution depended upon one witness. The defendant and his wife were the only persons at the affray. The questions put to Mrs. Cahoon, viz.: "Is it not a fact that you were not there at all? Has this been written out? Is it not a fact that you and your husband have concocted this whole story? You have been a witness for your husband in every lawsuit he has had, have you not?"—reflected upon the character of the witness, and bring the case within the rule laid down in *Sullivan v. Deiter*,

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86 Mich. 404. See, also, *Leahy v. State* (Neb.), 48 N. W. Rep. 390; *People v. Montague*, 71 Mich. 447; *People v. Quick*, 58 Id. 321; *People v. Dane*, 59 Id. 550. The witness does not appear to have attempted to evade any questions. When asked if she and her husband had not talked the matter over, she replied promptly that they had. The prosecuting attorney had an undoubted right to follow up this answer, and bring out that talk; but clearly he had no right to discredit the witness by innuendo. He could not have expected the witness to have answered that what she had sworn to was written out for her, or that she and her husband had concocted the story. The questions as to her husband's lawsuits, and as to whether she had not been a witness in all of them, were manifestly improper.

What occurred after the defense had rested is equally indefensible. However innocent the purpose of the prosecuting attorney may have been, his remarks were calculated to impress the jury with the belief that the people were prepared to impeach the defendant by his own neighbors, and that the procurement of witnesses for that purpose was usually difficult, but in the present case was an easy matter. When the court declined to admit the testimony, the prosecuting attorney recalled the defendant, and proceeded to question him as to whether he had not been impeached in other cases, and if, in a number of other instances, his neighbors had not been brought into court for the purpose of impeaching him. This was clearly an attempt to break down this witness by methods and innuendo, rather than by competent testimony, and could not have been less than prejudicial.

It is insisted also that the verdict cannot be sustained, for the reason that the offense proven by complaining witness was that charged in the first count, and that

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the case is within the rule laid down in *People v. Partridge*, 86 Mich. 243. The cases are clearly distinguishable. Here defendant in both counts was charged with an intent to do something that was not done. In the Partridge case the respondent was charged in the first count with an offense from the commission of which the intent is presumed, and in the second count with a lesser offense, without intention to commit the crime charged in the first count. The proofs in that case conclusively showed that the crime charged in the first count had actually been committed, but the jury found the defendant guilty of the offense charged in the second count; in other words, the jury found the defendant guilty of the lesser offense without intending to commit the greater, while the evidence showed that he had actually committed the greater, an intent to do which the law presumes from the doing of the act. In the present case the defendant admitted the use of the pitchfork, but denied the threat to kill. The jury was not compelled to accept either account of the affray in all its details. The intent could only be gathered from what was said and done. The testimony was conflicting. The jury concluded that there was no intent to kill, but that there was intent to do great bodily harm. The intent to do either could not be presumed, but must be found; and the jury might have found defendant guilty of neither offense, but of an assault simply. This contention cannot, therefore, be sustained.

For the errors referred to the verdict must be set aside, and a new trial had upon the second count in the information.

The other Justices concurred.

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THE SHAFER IRON COMPANY (A FOREIGN CORPORATION) v. JOHN W. STONE, CIRCUIT JUDGE OF IRON COUNTY.

Garnishment—Foreign corporations—Service of process—Personal examination of officers.

1. How. Stat. § 8086, as amended by Act No. 266, Laws of 1889, authorizing the service of a writ of garnishment upon any officer or agent of a foreign corporation found within this State, is not confined to a *general* agent of the corporation.

   So *held*, where service was made upon the resident agent of a mining company, whose duties consisted in acting as custodian of the corporate property in the county where its mining operations were carried on, and inspecting the work of its contractors in said county; which service is sustained.

2. How. Stat. § 8061, requiring a garnishee to appear before a circuit judge or circuit court commissioner and submit to a personal examination touching his liability as garnishee, does not apply to a foreign corporation, when summoned as garnishee.

3. A circuit judge has no power to order any or all of the officers of a foreign corporation, against which garnishment proceedings are pending, to appear and bring before him the books and papers of the corporation, and submit to an examination on oath concerning its liability as such garnishee.

Mandamus. Submitted November 5, 1891. Granted in part November 20, 1891.

Relator applied for *mandamus* to compel respondent to quash a writ of garnishment, and to set aside an order for the examination of its officers, agents, etc., before the respondent touching its liability as garnishee. The facts are stated in the opinion.

E. E. Osborn, for relator.

R. C. Flannigan, for respondent.

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PER CURIAM. August 3, 1891, a writ of garnishment was issued against the petitioner in a suit in the circuit court for Iron county, in which John Corcoran and James F. Corcoran were plaintiffs, and Edward P. Jennings defendant. The affidavit upon which the writ was issued states that Jennings was indebted to the plaintiffs in the sum of $5,672.64 over and above all legal set-offs, and that the debt was then due. The affidavit further states that the affiant—

"Has good reason to believe and does believe that the Shafer Iron Company, a foreign corporation under the laws of the state of Illinois, now engaged in and carrying on the business of iron mining in said county of Iron, has property, money, goods, chattels, credits, and effects in its hands and under its custody and control belonging to the said Edward P. Jennings, the said defendant, and that the said Shafer Iron Company is indebted to the said Edward P. Jennings."

The writ of garnishment was placed in the hands of the sheriff of that county, who returned that he had served it upon said petitioner on the 3d day of August, 1891, by delivering a copy thereof to Thomas B. Biggers, the agent of the Shafer Iron Company having charge of its business in this State.

On August 29, 1891, the Shafer Iron Company prepared and caused to be filed with the clerk of that county two disclosures under oath; one made by its president, denying the jurisdiction of the court to require such disclosure, and answering that said company had no property, money, goods, chattels, credits, or effects in its hands or under its custody and control belonging to the defendant, and that it was not indebted to the defendant in any amount whatever. The other disclosure was made by Mr. Biggers, who stated therein that he was the agent of the Shafer Iron Company, residing in the village of

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Crystal Falls, in said county of Iron, and that his duties as such had always consisted and then consisted in acting as custodian of the property of the company in the county of Iron, and inspecting the work of mining carried on by contractors in the mines of the company in that county, and that he had not had, and did not then have, any other duties or powers in connection with the affairs of the company; and that he had no personal knowledge whatever with reference to the dealings between the company and the defendant, but that he was informed that the company had no property, money, goods, chattels, credits, or effects in its hands or under its custody or control belonging to the defendant, and that it was not indebted to the defendant in any amount whatever.

The disclosures were filed and copies served upon plaintiffs' attorney, who on September 7, 1891, filed a demand for an examination of the company and of its officers, agents, and book-keepers on oath concerning all matters of liability of the company to the defendant before the circuit judge of that county, and also gave notice of the demand, and that the company, its officers, agents, and book-keepers having knowledge concerning said liability, were required to appear before the circuit judge at chambers in the city of Marquette, September 14, 1891, at 2 o'clock in the afternoon, to submit to such examination on oath. These notices were served upon Mr. Biggers, and also upon Mr. Osborn, who had appeared as attorney for the company.

October 7, 1891, the circuit judge made an order, in which, after reciting the proceedings hereinbefore stated, and that the petitioner had failed to produce said officers and agents before him under said notice, it was ordered that the company produce said officers before the circuit judge at chambers, at the city of Marquette, on January

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4, 1892, for examination on oath concerning all matters of the liability of the company as such garnishee; and if, to the knowledge of the company, the matters concerning its liability as such garnishee were partly within the knowledge of one of its officers or one of its agents, and partly within the knowledge of another or other of its officers and agents, then that it produce at the time and place aforesaid, for examination on oath, such of its officers or agents as severally had knowledge concerning the matters of the liability of the company as such garnishee.

October 10, 1891, the company moved the circuit court for the county of Iron, then sitting, to set aside the service of the writ of garnishment, quash the same, and vacate all the proceedings therein; also to vacate and set aside the order made by the circuit judge requiring the company to produce its officers and agents before him on January 4, 1892. This motion came on to be heard, and was denied by that court.

The defendant company files its petition in this Court setting forth the above facts, and asks a *mandamus* to compel the circuit court to quash the writ of garnishment, and to set aside its order for examination of its officers, agents, etc., made October 7, 1891. The order to show cause was issued, to which the circuit judge makes return to this Court that the facts set out in the petition are substantially as stated.

The claim made by the counsel for relator is that the writ should be quashed for the reason that Biggers, upon whom the writ was served, was not such an agent of the company as is contemplated by the statute, upon whom process of garnishment might be served where a corporation was a non-resident of the State. By section 8086, How. Stat., as amended (Act No. 266, Laws of 1889), it is provided:

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"Any corporation, domestic or foreign, other than municipal, may be garnished under this act. If domestic, the writ of garnishment may be served upon the president, secretary, cashier, or treasurer, superintendent, or general agent, or such other officer as the corporation may appoint or the court direct; and the officer served, and such other officer as the court or commissioner may order by rule or citation, as hereinbefore provided for, shall make disclosure, and the same shall be considered the answer of the corporation. If a foreign corporation, the writ of garnishment may be served upon any officer or agent of the corporation, upon the conductor of any railroad train, or upon the master of any vessel belonging to and in service of the corporation, found within this State, whether said officer or agent be in this State upon the business of said corporation or not; and said officer or agent shall make disclosure, and the same shall be considered the answer of the corporation."

The contention of counsel for relator is that the provision of the statute relative to service upon foreign corporations should be considered as applying only to a general agent or officer, cognizant of its affairs and competent to make disclosure on its behalf, and could not be applied to any other than a general agent of the company; that the Legislature could not have intended such an injustice as to place the company at the mercy of a disaffected or careless employé, who in no sense represented the company so as to contract on its behalf, or require of an agent who knew nothing of the matter the impossibility of making a disclosure. Counsel says that, the Legislature having limited by the act the authority to make service upon a domestic corporation to its principal officers or general agent, it is evident the Legislature intended to place foreign corporations on the same footing, and to limit the service of garnishee process also to general agents.

We know of no such rule of construction. From the fact that the service can only be made, in case the cor-

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poration is a domestic one, upon its principal officers and general agent, and there is no such limitation applying in case the corporation is a foreign one, it is evident that the Legislature intended not to limit the service to the general agent of foreign corporations, and it may have been for a very good reason. In the case of a domestic corporation, its principal office is located within the State, and its principal officers are generally residents of the State. Its principal business is carried on here, requiring the presence of its general manager, its superintendent, and its general officers, and process may be readily served within the State upon its officers, superintendent, and general manager. In the case of a foreign corporation, however, its principal business may be carried on outside of the State. Its general office may be located outside the State, and its principal officers and its general manager may not be found within the State; and the Legislature has therefore determined by the act that the garnishee process may be served upon any officer or agent of the corporation within the State, whether said officer or agent be in this State upon the business of said corporation or not, and that such officer or agent shall make disclosure, and the disclosure shall be considered the answer of the corporation itself. There is no more hardship in this than in the provision contained in the same statute as to the service of process upon railroad companies by the service upon a conductor of a train. From the sworn disclosure made by Mr. Biggers it is apparent that he was as well conversant with the affairs of that corporation as could any railroad conductor be with the affairs of a railroad corporation. It must therefore be held that the service upon Mr. Biggers, as agent of the corporation, was a proper service.

The claim is made by counsel for relator that this part of the statute of 1889, relative to service upon foreign

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corporations, is in conflict with the fourteenth amendment to the Constitution of the United States, that "no state shall deny to any person within its jurisdiction the equal protection of the laws." We cannot agree with the learned counsel. When a foreign corporation comes within this State, and seeks to carry on its business here, it must do so in compliance with our laws. A corporation created by a state is a mere creation of local law. It has been repeatedly held, and there seems to be no conflict of authority, that corporations of one state have no right to exercise their franchises in any other state except by the consent of such other state.

The other question raised upon this record—whether a circuit judge or circuit court commissioner can order any or all of the officers of a foreign corporation to appear and bring before him the books and papers of the corporation, and submit to an examination on oath concerning all matters of the liability of the corporation as such garnishee—is a very important one, and calls for careful consideration. The corporation, and not the officers, is the garnishee; and, ordinarily, an agent cannot be compelled to make disclosure unless required by some positive provision of law. The only provision requiring an officer or agent of a foreign corporation to make disclosure is found in Act No. 266, above quoted. There is no provision requiring such officer or agent to appear and submit to examination required of a garnishee under section 8061, How. Stat. That section says the garnishee shall appear. It contemplates a personal examination, and cannot be construed to extend to the garnishee's agents. It provides that the testimony or statement made on such personal examination shall be reduced to writing by the judge and signed by the garnishee, and the judge shall report and file the same with the clerk of that county. If he does not appear and submit to such examination,

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as required by the order, his default may be taken for want of appearance and submission to such examination, and the default made absolute, as in other personal actions, and the case proceed to judgment against the principal defendant; whereupon judgment may be rendered and execution issued against such garnishee.

It is manifest that this section of the statute cannot apply to foreign corporations, because proceedings against foreign corporations are regulated by section 8086 of Howell's Annotated Statutes. This section, as amended by Act No. 266, Laws of 1889, is the only statute which authorizes proceedings against corporations by garnishment, either domestic or foreign. This section does authorize the writ to be—

"Served upon the president, secretary, cashier, or treasurer, superintendent, or general agent, or such other officer as the corporation may appoint or the court direct; and the officer served, and such other officer as the court or commissioner may order by rule or citation, as hereinbefore provided for, shall make disclosure, and the same shall be considered the answer of the corporation."

But no such provision is found with reference to foreign corporations. It provides, as above stated, for service upon any officer or agent, and that such officer or agent shall make disclosure, which shall be considered the answer of the corporation; and then, instead of providing that the court may order a disclosure, it is enacted, under a proviso,—

"That in all such cases of foreign corporations, if said officer or agent shall neglect or refuse to file disclosure to said writ, as hereinbefore in this chapter provided, the default of said foreign corporation may be entered as in other cases, and upon the entry of judgment against the principal defendant judgment may be entered in said garnishee proceedings against said foreign corporation for the amount thereof, including costs."

And it is further provided that—

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"No judgment on default shall be rendered against said foreign corporation until the expiration of 60 days after the entry of judgment against the principal defendant, and the plaintiff shall, within 20 days after judgment against the principal defendant, serve notice by mail on the foreign corporation at its home office that judgment has been obtained against the principal defendant, and that at the expiration of 60 days from the date of said judgment application would be made for judgment against it, as hereinbefore provided."

This shows that the Legislature intended to deal with foreign corporations on a different basis than with either domestic corporations or natural persons. These provisions are intended to take the place of a personal examination, leaving the plaintiff at liberty to proceed to file interrogatories or to take issue upon the disclosure.

It could never have been the intention of the Legislature to compel all the officers of a corporation to attend in person, and produce their books and papers, from a distant state, for the examination and inspection of any person who might allege upon information and belief that it was in some way or manner indebted to his debtor. If they can be required to attend from Illinois, they can be from Washington or California, at the peril of having a judgment taken against them if they fail to obey the order. The statute does not authorize the court to make any such order, and therefore the authority does not exist.

The *mandamus* must be issued directing the circuit judge to vacate so much of said order as commands the attendance of the officers and agents and the production of their books on January 4, 1892.

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WILLIAM C. WILLIAMS, ALANSON SHELEY, AND ALANSON SHELEY BROOKS v. JACOB S. FARRAND, RICHARD P. WILLIAMS, HARVEY C. CLARK, AND JACOB S. FARRAND, JR.

Partnership—Dissolution—Rights of retiring and continuing partners—Firm name—Good-will—Trade-marks.

1. The following propositions must be regarded as established by the clear weight of authority:

a—Though a retiring partner may have assigned his interest in the partnership business, including its good-will, to his co-partner, he may, in the absence of an express agreement to the contrary, engage in the same line of business in the same locality, and in his own name.

b—He may, by newspaper advertisements, cards, and general circulars, invite the general public to trade with him, and through the same mediums may advertise his long connection with the old business, and his retirement therefrom.

c—He will not be allowed, however, to use his own name, or to advertise his business, in such a way as to lead the public to suppose that he is continuing the old business; hence he will not be allowed to advertise himself as its successor.

d—The purchaser will not, in the absence of an express agreement, be allowed to continue the business in the name of the old firm.

e—No man has a right to sell or advertise his own business or goods as those of another, and so mislead the public, and injure the business of such other person.

f—When an express contract has been made to remain out of business, or for the use by the purchaser of a fictitious name, or a trade-name, or a trade-mark, the courts will enjoin its continued violation; citing *Beal v. Chase*, 31 Mich. 490; *Doty v. Martin*, 32 Id. 462; *Grow v. Seligman*, 47 Id. 607.

g—An assignment of all the stock, property, and effects of a business, or the exclusive right to manufacture a given article, carries with it the exclusive right to use a fictitious name in which such business has been carried on, and such trade-marks and trade-names as have been in use in such business. These incidents attach to the business or right of manufacture, and pass with it.

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h—A corporate name is regarded as in the nature of a trade-mark, even though composed of individual names, and its simulation may be restrained.

2. The doctrine that a retiring partner, who has conveyed his interest in an established business, whether the good-will be included or not, cannot personally solicit the customers of the old firm, has no support in principle.

3. The rule that upon the dissolution of a firm neither partner has the right to use the old firm name, as well as the other rule that a retiring partner has no right to use it, are subject to the exception that a person has the right to use his own name unless he has expressly covenanted otherwise.

4. Complainants have, under the authorities cited, an undoubted right to protection in the proprietary rights acquired by the old firm, and in the use of such trade-marks as were in use by the old firm, and defendants have no right so to imitate the labels in use by the old firm as to convey the belief that the goods labeled are from the old house. The use, however, of the words, "Sold by Farrand, Williams & Co.," or "Prepared by Farrand, Williams & Co.," upon a label, will not be protected as a trade-mark or trade-name, and the right to use the name in that connection did not pass under the bill of sale set forth in the opinion.

5. The following propositions are summarized from the opinion of Mr. Justice McGRATH:

a—Good-will may be said to be those intangible advantages or incidents which are impersonal, so far as the grantor is concerned, and attach to the thing conveyed.

b—Where good-will consists of the advantages of location, it follows an assignment of the lease of that location. Again, it may not depend at all upon location, as in the case of a newspaper, and it would follow an assignment of all interest in the plant, property, effects, and business.

c—A partnership name may become impersonal after the death of the partners, and it is then treated like a fictitious or corporate name.

d—A surname may become impersonal when it is attached to an article of manufacture, and becomes the name by which such article is known in the market, and the right to use the name may in consequence follow a grant of the right to manufacture that article, or a sale of the business of its manufacture; and when the right to manufacture is exclusive, the right to use the name as applied to the article becomes likewise exclusive.

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Appeal from Wayne. (Reilly, J.) Argued February 12, 1891. Decided November 20, 1891.

Bill to restrain the defendants from using any combination of the names Farrand and Williams as part of their firm name. Complainants appeal. Decree dismissing bill affirmed. The facts are stated in the opinions.

William H. Wells (*Ashley Pond, Bowen, Douglas & Whiting*, of counsel), for complainants.

Moore & Canfield (*F. H. Canfield* and *H. H. Swan*, of counsel), for defendants.

[The points and authorities of the respective counsel are so fully stated and reviewed in the opinions that a further statement is omitted.—REPORTER.]

MCGRATH, J. Complainants and defendants had been for some years engaged as wholesale druggists on Larned street east, in the city of Detroit, as copartners, under the name and style of Farrand, Williams & Co. There were no articles of copartnership, and no term fixed for which the partnership was to continue.

Prior to the taking of the annual inventory in January, 1890, defendant Jacob S. Farrand expressed to complainant Sheley a desire to dissolve the copartnership. Mr. Sheley declined to say anything until the annual inventory should be taken, and the business of the year settled up. On the 25th of January, 1890, after the completion of the inventory, defendants made a proposition in writing to—

"Pay Messrs. Sheley & Brooks, for their interest in the firm of Farrand, Williams & Co., the amount of their interest being fifty thousand dollars ($50,000), the sum of sixty thousand dollars ($60,000), or they will take for their interest, the amount being one hundred thousand dollars ($100,000), the sum of one hundred and twenty

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thousand dollars ($120,000), the same to be paid in cash, or in notes acceptable to the parties who sell, one week from to-day, Saturday, the first day of February next; the store to be leased to the party purchasing for a term of five years at a rent of eight thousand dollars ($8,000) a year, and the warehouse to be rented to the party purchasing at a net rental of 6 per cent. a year on the cost of their interest therein."

On the following Monday Mr. Sheley accepted defendants' offer to sell, and on the 1st day of February following a bill of sale was prepared, reciting, among other things, that defendants, in consideration of the sum of $120,000, paid to them by Alanson Sheley, party of the second part,—

"Have bargained and sold unto the said party of the second part * * * all our right, title, and interest to the within-mentioned resources of said firm, including the good-will attendant upon the business."

This bill of sale was not executed, objection being made to the clause, "including the good-will attendant upon the business;" and a new instrument was prepared, reciting that defendants, parties of the first part,—

"For and in consideration of the sum of one hundred and twenty thousand dollars, * * * to them paid by Alanson Sheley, * * * of the second part, * * * have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, his executors, administrators, or assigns, all our right, title, and interest in the firm of Farrand, Williams & Company."

This instrument was executed, the insurance policies were assigned by Farrand, Williams & Co. to Williams, Sheley & Brooks, and an agreement to assume and pay all the debts of the old firm was executed by Williams, Sheley & Brooks, and delivered to defendants.

Defendants afterwards formed a copartnership under the firm name of Farrand, Williams & Clark, and opened a wholesale drug establishment at No. 32 Woodward

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avenue. Complainants adopted the name and style of Williams, Sheley & Brooks; posted their firm name, as successors to Farrand, Williams & Co., over their place of business; had the words "Williams, Sheley & Brooks, Successors to" printed in red ink over the words "Farrand, Williams & Co." wherever the latter appeared upon letter-heads, bill-heads, labels, and other stationery; advertised themselves in the newspapers and trade journals as Williams, Sheley & Brooks, successors to Farrand, Williams & Co.; and sent out circulars to the trade containing not only their firm name, but the names of the individual members of the new firm. Defendants also extensively advertised the new enterprise through the same mediums, calling special attention to the names of the members of the new firm, their long connection with the drug business, and the dissolution of the old firm, and soliciting trade.

The complainants contend that the assignment by defendants of all interest in the business carried with it the good-will of the business, and, having purchased the good-will of that business, they are entitled to the exclusive use of the old firm name; that, while defendants have the right to engage in the same line of business, they have not the right to such a collocation of their own names as will produce confusion, attract customers, and secure orders, letters, and goods intended for the old firm; that defendants have no right to simulate their labels, to solicit their customers, or entice away their employés.

"Good-will" has been defined by this Court to be—

"The favor which the management of a business has won from the public, and the probability that old customers will continue their patronage." *Chittenden v. Witbeck*, 50 Mich. 401.

Lord Eldon, in *Cruttwell v. Lye*, 17 Ves. 335, defined

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it as simply the probability that old customers will resort to the old place.

The following propositions must be regarded as established by the clear weight of authority:

1. Though a retiring partner may have assigned his interest in the partnership business, including the good-will thereof, to his copartner, he may, in the absence of an express agreement to the contrary, engage in the same line of business in the same locality, and in his own name.

2. He may, by newspaper advertisements, cards, and general circulars, invite the general public to trade with him, and through the same mediums advertise his long connection with the old business, and his retirement therefrom.

3. He will not be allowed, however, to use his own name, or to advertise his business, in such a way as to lead the public to suppose that he is continuing the old business; hence, will not be allowed to advertise himself as its successor.

4. The purchaser will not, in the absence of an express agreement, be allowed to continue the business in the name of the old firm.

5. That no man has a right to sell or advertise his own business or goods as those of another, and so mislead the public, and injure such other person.

In *Myers v. Buggy Co.*, 54 Mich. 215, A., B., and C. had been carrying on business as copartners at Kalamazoo, under the name and style of "The Kalamazoo Wagon Company." A., B., and C. sold to complainant "all of their interest in the property, money, assets, and good-will," etc., in and to their business. After such sale complainant's assignors formed a corporation under the name of "The Kalamazoo Buggy Company;" pitched their plant in the same locality; commenced the manu-

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facture of the same class of goods; issued circulars to the trade, with descriptive cuts of the same character and appearance as those contained in complainant's circulars, and advertised their place of business as being in the same locality. In that case the name of "The Kalamazoo Wagon Company" was an assumed name. The only distinctive feature in the name adopted by defendants was the use of a word of similar meaning to that for which it had been substituted. The defendants were not using their own names. It was a pure case of piracy, and the facts clearly indicated an intention to deceive the public. As was said in *Burgess v. Burgess*, 3 DeGex, M. & G. 896:

"Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff."

In *Lee v. Haley*, L. R. 5 Ch. App. 155, plaintiffs had been doing business at No. 22 Pall Mall, under the *artificial* name of "Guinea Coal Company." Defendant, who had been their manager, set up a rival business under the name of "Pall Mall Guinea Coal Company," at 46 Pall Mall. His envelopes and business cards were printed in such a way as to resemble the plaintiffs'.

In *Glenny v. Smith*, 2 Drew. & S. 476, defendant had been in plaintiffs' employ, and started in business on his own account. Over his shop he had his own name, Frank P. Smith, printed in large, black letters on a white ground, but on the brass plates under the windows of his shop he had engraved the word "from," in small letters, and the words "Thresher & Glenny" (the name of plaintiffs' firm) in large letters. He had an awning in front

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of his shop, which, when let down, would cover his own name, and expose only the name of plaintiffs' firm. The court held that defendant was deceiving the public, and an injunction was issued. *Croft v. Day*, 7 Beav. 84; *Levy v. Walker*, 10 Ch. Div. 436; *Turton v. Turton*, 42 Id. 128; *Hookham v. Pottage*, L. R. 8 Ch. App. 91; *Meneely v. Meneely*, 62 N. Y. 431; *Fullwood v. Fullwood*, 9 Ch. Div. 176.

6. That when an express contract has been made to remain out of business, or for the use by a purchaser of a fictitious name, or a trade-name, or a trade-mark, the courts will enjoin the continued violation of such agreement.

In *Grow v. Seligman*, 47 Mich. 607, defendant had carried on the clothing business at Bay City, under the name and style of "Little Jake," and sold out to complainant, and expressly conveyed the right to use the name and style of "Little Jake," and agreed that he would not again engage in that business at Bay City, and defendant was enjoined from violating his agreement.

In *Shackle v. Baker*, 14 Ves. 468, defendant agreed that he would not, for the space of ten years, carry on or permit any other person to carry on the same business in Middlesex, London, or Westminster, and that he would use his best endeavors to assist plaintiff, and procure customers for him.

In *Hitchcock v. Coker*, 6 Adol. & E. 438, Coker had agreed to enter the services of plaintiff, and that he would not at any time thereafter engage in the business in which his employer was engaged. To the same effect are *Beal v. Chase*, 31 Mich. 490; *Doty v. Martin*, 32 Id. 462; *Burckhardt v. Burckhardt*, 36 Ohio St. 261; *Vernon v. Hallam*, 34 Ch. Div. 752; *Tode v. Gross*, 28 N. E. Rep. (N. Y. App.) 469.

7. That an assignment of all the stock, property, and

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effects of a business, or the exclusive right to manufacture a given article, carries with it the exclusive right to use a fictitious name in which such business has been carried on, and such trade-marks and trade-names as have been in use in such business. These incidents attach to the business or right of manufacture, and pass with it.

Courts have uniformly held that a trade-mark has no separate existence; that there is no property in words, as detached from the thing to which they are applied; and that a conveyance of the thing to which it is attached carries with it the name. *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. 321; *Lockwood v. Bostwick*, 2 Daly, 521; *Derringer v. Plate*, 29 Cal. 292.

In *Gage v. Publishing Co.*, 11 Ont. App. 402, Gage and Beatty were copartners, and, among other things, were engaged in publishing "Beatty's Headline Copy-Books." Beatty sold out to Gage all his interest in the business, and engaged in the drug business. Gage continued for some years the sale of the copy-books, when Beatty licensed defendant to publish "Beatty's New and Improved Headline Copy-Books."[1]

In *Hoxie v. Chaney*, 143 Mass. 592 (10 N. E. Rep. 713), Hoxie and Chaney were copartners, engaged in the manufacture of soaps, two brands of which were known as "Hoxie's Mineral Soap" and "Hoxie's Pumice Soap." These were simply trade-names, by which the articles were known, and the right to use them passed with the right to manufacture the articles.

In *Cement Co. v. Le Page*, 147 Mass. 206 (17 N. E. Rep. 304), Brooks and Le Page, as copartners, sold to plaintiff the good-will of their business, and the right to use their trade-marks. They were engaged in the manufacture of glues. Their light glues they named "Le

[1] See 11 Can. Sup. Ct. 306.

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Page's Liquid Glues." The court held that the right to use the name by which the articles were known to the trade passed with the right to manufacture the articles.

In *Merry v. Hoopes*, 111 N. Y. 415 (18 N. E. Rep. 714), the parties were formerly partners. Hoopes sold to Merry, but afterwards undertook to use certain trade-marks, viz., the "Lion Brand" and "Phœnix Brand," but the court held that these trade-marks passed to the assignee.

In *Hall v. Barrows*, 4 De Gex, J. & S. 150, the firm had marked the chief part of their output of iron with the initial letters of their partnership name, "B. B. H.," surmounted by a crown, and the court held the letters and crown had become a trade-mark, and, as such, should be included as a subject of value. Brown, Trade-Marks, 358; *Millington v. Fox*, 3 Mylne & C. 338, 352; *Myers v. Buggy Co.*, 54 Mich. 215; *Sohier v. Johnson*, 111 Mass. 242; *Shipwright v. Clements*, 19 Wkly. Rep. 599; *Rogers v. Taintor*, 97 Mass. 291.

8. A corporate name is regarded in the nature of a trade-mark, even though composed of individual names, and its simulation may be restrained. After adoption it follows the corporation. Statutes providing for the organization of corporations usually prohibit the adoption of the same name by two companies. *Holmes v. Manufacturing Co.*, 37 Conn. 278.

These propositions are sustained by a long line of authorities, but in none of the cases cited does the question hinge upon a grant of good-will. Complainants insist, however, that a grant of good-will may be implied, and, when express or implied, it imposes certain restraints upon the vendors, viz.:

1. That they cannot afterwards personally solicit customers of the old firm.

2. That they are restricted in the use that may be made of their own names.

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1. The doctrine that a retiring partner, who has conveyed his interest in an established business, whether the good-will be included or not, cannot personally solicit the customers of the old firm, has no support in principle. A retiring partner conveys, in addition to his interest in the tangible effects, simply the advantages that an established business possesses over a new enterprise. The old business is an assured success, the new an experiment. The old business is a going business, and produces its accustomed profits on the day after the transfer. It is capital already invested, and earning profits. The continuing partner gets these advantages. The new business must be built up. The capital taken out of the old concern will earn nothing for months, and in all probability the first year's business will show loss instead of profit. For a time at least it is capital awaiting investment, or invested, but earning nothing. The retiring partner takes these chances or disadvantages. He does not agree that the benefit derived from his connection with that business shall continue. He does not agree that the old business shall continue to have the benefit of his name, reputation, or service; nor does he guarantee the continuance of that patronage which may have been attracted by his name or reputation. He does not pledge a continuance of conditions. He takes out of the business an element that has contributed to the success of that business. He sells only those advantages and incidents which attach to the property and location, rather than those which attach to the person of the vendor. T. Pars. Partn. 409. He sells only so much of the custom as will continue in spite of his retirement and activity. He sells probabilities, not assurances. It is urged that by the solicitation of the customers of the old firm he is endeavoring to impair the value of that which he has sold; but every act of his in the direction of the establishment of the

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new business tends to divert the customers of the old firm. The right to enter into the same line of business in the same locality,—next door, if you please,—to advertise his former connection with the old business, and to solicit generally the patronage of the public, is conceded by the clear weight of authority. The exercise of these rights necessarily involves the diversion of custom to the new firm. Does not the right to engage again in the same line of business include all of the incidents of that right? Upon what principle is the line arbitrarily drawn at the *personal* solicitation of the customers of the old firm? The right to engage in business in his own name attaches to the retiring partner, and, unless expressly so agreed, there is no restraint upon that right.

In the present case, Jacob S. Farrand had been at the head of the old house for half a century. His name could not be subsequently used in the same line of business without attracting the attention of the entire trade, nor without affecting the probabilities of a continuance of the patronage of the old house. He gave no hint that he did not intend to engage again in business. All of the circumstances pointed in the direction of a new business. The retirement was not of Jacob S. Farrand alone, but of his son-in-law and Mr. Clark also. The proposition made to complainants was not only to sell, but to buy.

In *Ginesi v. Cooper,* 14 Ch. Div. 596, the court went so far as to insist that a retiring partner had no right to deal with the customers of the old firm; but that rule would operate as a restriction upon the public, and the case is without support in that respect.

In *Labouchere v. Dawson,* L. R. 13 Eq. 322, the court say that a retiring partner who sells the good-will of a business is entitled to engage in a similar business, may publish any advertisement he pleases in the papers, stat-

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ing that he is carrying on such a business; he may publish circulars to all the world, and say that he is carrying on such a business; but he is not entitled, by private letter, or by visit by himself or agent, to solicit the customers of the old firm.

But in *Pearson v. Pearson*, 27 Ch. Div. 145, *Labouchere v. Dawson* is expressly overruled. The court say:

"The case of the plaintiff is founded on contract, and the question is, what are his rights under the contract? There is no express covenant not to solicit the customers of the old business, but it is said that such a covenant is to be implied. I have a great objection to straining words so as to make them imply a contract as to a point upon which the parties have said nothing, particularly when it is a point which was in their contemplation. It is said that there was a sale of the good-will. I think that there was, taking good-will as defined by Lord Eldon in *Cruttwell v. Lye*, 17 Ves. 335. The purchaser has a right to the place and a right to get in the old bills; so the purchaser gets the good-will, as defined by Lord Eldon. But the term 'good-will' is not used; and when a contract is sought to be implied we must not substitute one word for another. * * * But suppose the word did occur, what is the effect of a sale of 'good-will.' It does not, *per se*, prevent the vendor from carrying on the same class of business."

Vernon v. Hallam, 34 Ch. Div. 752, held that a covenant by a vendor of a business, including the good-will thereof, that he would not for a term of years carry on the business of a manufacturer, either by himself or jointly with any other person, under the name or style of J. H. or H. Bros. (the name of the business which he had sold), is not a covenant that the vendor would not carry on business as a manufacturer, but against using a particular name or style in trade, and the injunction was granted to restrain a breach of that covenant.

"Where a vendor sold his business, and commenced a similar business in the same locality, and solicited customers of the old house to deal with him, the court,

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following the decision in *Pearson v. Pearson*, and being of opinion that the case of *Labouchere v. Dawson* had been overruled by the decision in that case, refused to grant an injunction to restrain such solicitation."

Leggott v. Barrett, 15 Ch. Div. 306, *Ginesi v. Cooper*, 14 Id. 596, and a number of other cases cited, follow *Labouchere v. Dawson*.

The correct rule is, we think, laid down in *Cottrell v. Manufacturing Co.*, 54 Conn. 138 (6 Atl. Rep. 791). The court say:

"Cottrell did not require Babcock to agree, and the latter did not agree, to abstain from the manufacture of printing-presses. By purchasing the good-will merely, Cottrell secured the right to conduct the old business at the old stand, with the probability in his favor that old customers would continue to go there. If he desired more, he should have secured it by positive agreement. The matter of good-will was in his mind. Presumptively he obtained all that he desired. At any rate, the express contract is the measure of his right; and since that conveys a good-will in terms, but says no more, the court will not upon inference deny to the vendor the possibility of successful competition by all lawful means with the vendee in the same business. No restraint upon trade may rest upon inference. Therefore, in the absence of any express stipulation to the contrary, Babcock might lawfully establish a similar business at the next door, and by advertisement, circular, card, and personal solicitation invite all the world, including the old customers of Cottrell & Babcock, to come there and purchase of him; being very careful always when addressing individuals or the public, either through the eye or the ear, not to lead any one to believe that the presses which he offered for sale *were manufactured by the plaintiffs*, or that he was the successor to the business of Cottrell & Babcock, or that Cottrell was not carrying on the business formerly conducted by that firm. That he may do this by advertisements and general circulars courts are substantially agreed, we think. But some have drawn the line here and barred personal solicitation. They permit the vendor of a good-will to establish a like business at the next door, and, by the potential instrumentalities of the news-

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paper and general circulars, ask the old customers to buy at the new place, and withhold from him only the instrumentality of highest power, namely, personal solicitation. To deny him the use of the newspaper and general circulars is to make successful business impossible, and therefore is to impose an absolute restraint upon the right to trade. This the courts could not do, except upon express agreement. But possibly the old customers might not see these; and in some cases the courts have undertaken to preserve this possibility for the advantage of the vendor, and found a legal principle upon it. Other courts have been of the opinion that no legal principle can be made to rest upon this distinction; that to deny the vendor personal access to old customers even would put him at such disadvantage in competition as to endanger his success; that they ought not upon inference to bar him from trade, either totally or partially; and that all restraint of that nature must come from his positive agreement. And such, we think, is the present tendency of the law."

Good-will may be said to be those intangible advantages or incidents which are impersonal, so far as the grantor is concerned, and attach to the thing conveyed. Where it consists of the advantages of location, it follows an assignment of the lease of that location. Again, it may not depend at all upon location, as in the case of a newspaper, and it would follow an assignment of all interest in the plant, property, effects, and business. A partnership name may become impersonal after the death of the partners, and it is then treated like a fictitious or corporate name. A surname may become impersonal when it is attached to an article of manufacture, and becomes the name by which such article is known in the market, and the right to use the name may in consequence follow a grant of the right to manufacture that article, or a sale of the business of manufacturing such article; and where the right to manufacture is exclusive, the right to the use of the name as applied to that article becomes likewise exclusive.

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It appears, however, that in the first bill of sale which was prepared the words, "including the good-will attendant upon the business," were inserted, but were objected to, stricken out, and a new bill of sale prepared, omitting any reference to good-will. But it is said that this clause was objected to because, in the opinion of the objector, it might preclude him from engaging in the same business, whereas, under the law, he would have such a right had the clause remained. The only use, however, which complainants now propose to make of the clause, treated as a part of the instrument, is to restrict that right to engage in business by taking away one of its incidents. Adopting the language used in *Churton v. Douglas,* Johns. Eng. Ch. 174, with reference to the right of plaintiff to continue the use of the old firm name, "I think the defendant is fully entitled to the benefit of the observation that it was proposed to him to insert such a provision, and that he refused it. I think, therefore, that this case goes a step higher than the authorities, and the defendant is entitled to put his case in the highest possible form with regard to his right" to engage in the same line of business.

II. The next question relates to the use by defendants of the firm name of Farrand, Williams & Clark. It is clear that complainants have no right to continue their business under the old firm name. The rule that upon a dissolution of a firm neither partner has the right to use the firm name, as well as the other rule that a retiring partner has no right to use the old firm name, are both subject to the exception that a person has the right to use his own name unless he has expressly covenanted otherwise. In case A. B. should sell out his business to C. D., in the absence of a grant to C. D. of the right to use the name of A. B., or an agreement to the contrary, is there any doubt but that A. B. would have the right

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to engage in the same line of business in his own name? In that case, such a probability would naturally suggest itself to C. D., and, if he desired to get the advantage of A. B.'s abstinence from business, he would insist upon an agreement to that effect.

In the present case, Mr. Farrand's name had been at the head of the firm name for nearly half a century, and the name of another of the retiring members corresponded with the only other surname used in the old firm name. It must have been evident to complainants that in any event the name of the new firm would be similar to that of the old firm. If complainants desired any protection against such a use of the names of the retiring members, they should have inserted a provision to that effect in the bill of sale. The right to continue the use of a firm name, as well as a restriction upon the use by a retiring partner of his own name, are proper subjects of bargain, sale, and agreement. Here neither have been purchased. Complainants have purchased the business of the old firm. They have the right to advertise themselves as succeeding to and continuing that business. The exercise of such a right does not conflict with any right reserved by defendants. Complainants, by such a holding out, commit no fraud, misrepresentation, or deception. They publish the truth only. Defendants have the right to use their own names, or any collocation of their own names. They have not adopted the old firm name, although it would have been appropriate. They have adopted no fictitious name. There is no deception in the use of the name adopted by them. The business of the old firm is a separate and distinct business. Defendants have no right to advertise their business as a continuation of the old firm business. They are subject to the rule already laid down, that no man has the right to sell or advertise his own goods or business as that of

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another, and so mislead the public and injure such other person.

In *Lathrop v. Lathrop*, 47 How. Pr. 532, after dissolution J. Lathrop formed a copartnership with one Tisdale, and adopted the name of J. Lathrop & Co., which was the style of the old firm. Held that, in the absence of any covenant with his late partner, he might legally do so.

In *Reeves v. Denicke*, 12 Abb. Pr. (N. S.) 92, the court say:

"In this case, the firm name was not sold or transferred to the defendants as constituting a part of the partnership property and effects; nor did the sale, in terms or by necessary implication, include the good-will of the business of the previous firm, and it is therefore unnecessary to determine whether the partnership name was a part of such good-will. There was no restraint upon the retiring partner holding him from engaging in a similar business, and he violated no obligation to the defendants by forming a new firm under his own name, and transacting a business in all respects like that which he had released to them. It is quite clear that the defendants acquired no right to continue the use of the partnership name of the old firm. If the good reputation of that firm was intended to pass into and become a part of the defendants' new firm, it should have been provided for in the conveyance. That it was not intended it should pass is evident from the omission to include it." *Seed Co. v. Dorr*, 70 Iowa, 481 (30 N. W. Rep. 866); *Bassett v. Percival*, 5 Allen, 345; *Machine Co. v. McGowan*, 22 Ohio St. 370.

In *Turton v. Turton*, 42 Ch. Div. 128, although there were no contract relations between the parties, the court say:

"No man can have the right to represent his goods as the goods of another person. Therefore, if a man uses his own name, that is no *prima facie* case, but if, besides using his own name, he does other things which show that he is intending to represent, and is in point of fact

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making his goods represent, the goods of another person, then he is to be prohibited; but not otherwise."

In *Hookham v. Pottage*, L. R. 8 Ch. App. 91, plaintiff and defendant had been copartners as Hookham & Pottage. Plaintiff succeeded to the business, and defendant afterwards set up a shop only a few doors away, and printed over the door the words, "Pottage, from Hookham & Pottage." The court held that—

"Defendant had a right to state that he was formerly manager, and afterwards a partner, in the firm of Hookham & Pottage, and that he had a right to avail himself, by the statement of that fact, of the reputation which he had so acquired; but that he had no right to make that statement, or to avail himself of that reputation, in such a way as was calculated to represent to the world that the business which he was carrying on was the business of Hookham & Pottage, or that Hookham had any interest in it."

In *Meneely v. Meneely*, 62 N. Y. 431, the court say:

"If the defendants were using the name of Meneely with the intention of holding themselves out as the successors of Andrew Meneely, and as the proprietors and managers of the old established foundry which was being conducted by the plaintiffs, and thus enticing away the plaintiffs' customers; and if, with that intention, they used the name in such a way as to make it appear to be that of the plaintiffs' firm, or resorted to any artifice to induce the belief that the establishment of the defendants was the same as that of the plaintiffs; and perhaps if, without any fraudulent intent, they had done acts calculated to mislead the public as to the identity of the establishments, and produce injury to the plaintiffs beyond that which resulted from the similarity of name, * * * then the court would enjoin them, not from the use of the name, but from using it in such a way as would deceive the public. * * * Every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that.

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the establishments are identical, or do anything calculated to mislead."

In *Fullwood v. Fullwood*, 9 Ch. Div. 176, R. J. Fullwood carried on business as manufacturer of annatto at 24 Somerset place, Hoxton, from 1785 to 1832. Plaintiff and three brothers, one of whom was the defendant, succeeded to the business, but ultimately the right to carry on the business vested in the plaintiff. Defendant, Matthew Fullwood, and another brother formed a copartnership in the name of E. Fullwood & Co., and issued and distributed in various ways cards containing the following: "Established over 85 years. E. Fullwood & Co. (late of Somerset place, Hoxton), Original Manufacturers of Liquid and Cake Annatto." They also placed around the bottles containing the annatto a wrapper resembling that which plaintiff used. The court say:

"Defendants are entitled to carry on their business under the firm name which they have adopted, if they are so minded, * * * provided that they do not represent themselves to be carrying on the business which has descended to plaintiff."

In *Bininger v. Clark*, 60 Barb. 113, the defendant wrongfully advertised himself as successor to the old firm, and made such a use of his own name as to indicate a fraudulent intent. *Hegeman v. Hegeman*, 8 Daly, 1; *Levy v. Walker*, 10 Ch. Div. 436.

In *Churton v. Douglas*, Johns. Eng. Ch. 174, plaintiffs and defendant had carried on the business of stuff merchants at Bradford, in a building owned by defendant, and known as "Hall Ings," under the name and style of John Douglas & Co. Defendant sold out to plaintiffs all his share, right, and title in the business, including the good-will, and executed to plaintiffs a seven-years lease of the premises occupied by the firm. Within a short

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period defendant set up in the same line of business, next door to plaintiffs, in a part of the same building known as "Hall Ings," adopting the old firm name of John Douglas & Co. The court held that defendant, by the use of the old firm name, and the surroundings, would be obtaining the custom of the old firm, by inducing the belief that his was a continuation of the old establishment. The court say:

"The authorities, I think, are conclusive upon this point that the mere expression of parting with or selling the good-will does not imply a contract on the part of the person parting with that good-will not to set up again in a similar business; but I use the expression 'similar' to avoid including the case of the vendor seeking to carry on the identical business. He does not contract that he will not carry on an exactly similar business, with all the advantage which he might acquire from his industry and labor, and from the regard people may have of him, and that *in a place next door, if you like,* to the very place where the former business was carried on. It is settled that it is the fault of those who wish any protection against such a class that they do not take care to insert the provision to that effect in the deed."

The same principle obtains with reference to trade-marks. One may have a right in his own name as a trade-mark, but he cannot have such a right as against another person of the same name, unless the defendant use a form of stamp or label so like that used by the plaintiff as to represent that the defendant's goods are of the plaintiff's manufacture. *Sykes v. Sykes,* 3 Barn. & C. 541; *Holloway v. Holloway,* 13 Beav. 209; *Rogers v. Taintor,* 97 Mass. 291; *Gilman v. Hunnewell,* 122 Mass. 139; *Manufacturing Co. v. Goodyear Rubber Co.,* 128 U. S. 598 (9 Sup. Ct. Rep. 166). The tests applied by all the authorities in this class of cases are: Is a corporate or trade or fictitious name simulated? Is the name assumed or adopted false in fact? Is it used in connection with locality or other representations so as to convey the

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impression that the business is a continuation of the old business?

Defendants are not responsible for the blunders made by clerks, postal clerks, mail carriers, telephone employés, or newspaper reporters.

In *Meneely v. Meneely*, the court say:

"Where the only confusion created is that which results from the similarity of names, the courts will not interfere."

In *Turton v. Turton* it is said that—

"Defendants are not responsible for the blunders made by the business community in not distinguishing between John Turton & Sons and Thomas Turton & Sons."

See, also, *Richardson & Boynton Co. v. Richardson & Morgan Co.*, 8 N. Y. Supp. 52; *Manufacturing Co. v. Goodyear Rubber Co.*, 128 U. S. 598.

Any collocation of the names of Farrand and Williams would create some confusion. Defendant Clark had been connected with the old business for 30 years, and Williams, the son-in-law of Mr. Farrand, for 21 years.

Defendants are using their own names only. They went into business on Woodward avenue, several blocks from the old stand. In every letter-head, bill-head, card, or advertisement in which their firm name appears they give the individual names of the members of the firm, the new place of business, and in no case have they represented that they are successors to the old firm. The bill-heads used by the old firm had a cut of the old stand on the left-hand upper corner, about three inches square. Those of the new firm contain no cut, and less than half the amount of matter. It would be exceedingly difficult to prepare two bill-heads more unlike. The letter-heads of the old firm contained two cuts,—one of the old stand, at the left hand, one of the Peninsular White Lead & Color Works, on the right. The

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dissimilarity is marked. The envelopes used by the old firm contain eight printed lines on the upper left-hand corner, occupying an inch and three-quarters of space. Those used by the new firm contain five lines, occupying about three-quarters of an inch in space. There has been no attempt at imitation in words or type. On March 15, 1890, they announced, through circulars distributed generally, that they had engaged in business at 32 and 34 Woodward avenue; that they expected to have their new store ready for occupancy in a few days; and that the work of getting a new stock of goods would be pushed as fast as possible. On April 7 they issued another circular, announcing that they were now prepared to fill orders, and hoping that the friendly acquaintance of many years would be continued. An advertisement is produced, wherein defendants say:

"Though it may seem paradoxical, it is nevertheless true, that the wholesale drug-house of Farrand, Williams & Clark is both the oldest and newest representative of this important commercial industry in Detroit."

But in the same advertisement they announce the dissolution of the old firm, their retirement from said firm, and the formation and business location of the new firm. It is difficult to imagine how such an advertisement would mislead the public. It contains no false colors.

Both parties advertised extensively in the city and State papers and in the trade journals; complainants giving the names of their individual members, and their new firm name, and advertising themselves as the successors to Farrand, Williams & Co.; and defendants giving the names of their individual members, and the name and business location of the new firm. Complainants sent out circulars to the trade generally, informing it of the dissolution of the old firm, the fact that they

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were the successors, and giving their firm name; and defendants sent out circulars announcing their withdrawal and the formation of a new firm. There is no doubt but that the dissolution of this firm, the fact that complainants had bought out the interest of defendants, the name adopted by complainants, the formation of the new firm, the names of its members, and the defendants' firm name, have been most extensively advertised by both parties, not only in the city, but throughout the State and Union.

Nearly 50 letters have been received by the old firm, since the dissolution, addressed to Farrand & Williams; Farrand & Williams Paint Co.; Farrand & Williams Drug Co.; Farrand, Sheley & Brooks; Farrand, Williams & Sheley; Farrand, Williams, Sheley & Co.; Farrand, Williams & Brooks; Farrand & Co.; Williams, Farrand & Co.; Williams & Farrand; and Williams & Co. It cannot be said that any act of defendants is responsible for these blunders. Confusion is inseparable from the dissolution of an old firm and the composition of two firms from its membership, especially when the name of but one of those who remain has appeared in the firm name, and the new firm is composed of one whose name for nearly half a century has stood at the head of the firm name, and the surname of another retiring member is the same as the only other name used in the old firm name.

It appears that at the outset defendant Clark by mistake opened two or three letters addressed "Farrand, Williams & Co.," but in every other instance defendants refused to receive mail directed to Farrand, Williams & Co., unless directed to defendants' street and number; that in a single instance Clark inadvertently signed a letter "Farrand, Williams & Co.;" that two checks were sent to defendants in payment for goods bought from

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them, which were payable to the order of Farrand, Williams & Co., and Mr. Farrand indorsed them Farrand, Williams & Co., and guaranteed the indorsements; that in four instances merchandise or articles not marked but intended for defendants were delivered to complainants, and afterwards taken away; that in two instances complainants were notified by freight agents that freight awaited delivery; that in both the goods were manifested to Farrand, Williams & Co., but marked, and were afterwards delivered, to Farrand, Williams & Clark, for whom they were intended; that complainants were notified that a sample box of glassware had been shipped to them, but they had not received it; that defendants received a sample box of glassware from the same house, which was billed to Farrand, Williams & Clark, and the latter were notified of the shipment by the assignors; that similar boxes of samples had been sent to other drug-houses at Detroit; that in one or two instances merchandise had been delivered to defendants which was intended for complainants; that in a single instance a customer at Port Huron, who knew of the dissolution, intending to call up the old house by telephone, asked for Farrand & Williams, was given Farrand, Williams & Clark, and told that it was Farrand, Williams & Clark, asked the price of oil, and ordered one barrel; that 112 letters, telegrams, receipts, or bills were received by complainants directed to Farrand, Williams & Co., which were intended for defendants; that of these 35 were directed on the inside to Farrand, Williams & Clark; that all of the letters so received were from business houses from which defendants were buying goods, and none were from customers of either house. These proofs do not tend to show any appropriation by defendants of the old firm name, or any attempt to secure the correspondence addressed to the old

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firm, or that the customers have been deceived or misled, or that defendants have practiced any fraud, concealment, or deception.

Complaint is made in the bill that defendants have enticed away certain of complainants' salesmen, but this charge is not made out by the proofs.

It is also charged that defendants have simulated certain trade-marks and labels used by the old firm, but no instance of piracy has been established. Complainants have, under the authorities cited, an undoubted right to protection in the proprietary rights acquired by the old firm, and in the use of such trade-marks as were in use by the old firm, and defendants have no right so to imitate the labels in use by the old firm as to convey the belief that the goods labeled are from the old house. The use, however, of the words, "Sold by Farrand, Williams & Co.," or "Prepared by Farrand, Williams & Co.," upon a label, will not be protected as a trade-mark or trade-name, and the right to use that name in that connection did not pass under the bill of sale.

The decree of the court below must be affirmed as of February 27, 1891, and the bill dismissed, with costs to defendants.

MORSE and GRANT, JJ., concurred with MCGRATH, J. LONG, J., did not sit.

CHAMPLIN, C. J. (*dissenting*). I cannot concur with the conclusion reached by a majority of the Court in this cause.

In order to arrive at a correct understanding of the issues involved, I have deemed it necessary to set out with considerable particularity the pleadings in the cause, and to refer to the testimony in a general way by which the allegations of the complainants are substantiated;

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and, at the risk of repetition of what is contained in the opinion handed down by the majority of the Court, I will proceed to state my views upon the merits of this controversy.

The complainants in this suit are copartners in the wholesale drug trade, under the firm name of Williams, Sheley & Brooks. Their place of business is at Nos. 11 to 17 East Larned street, in Detroit. The defendants are also copartners in the wholesale drug business under the firm name of Farrand, Williams & Clark. Their place of business is at Nos. 32 and 34 Woodward avenue, in Detroit. The bill is filed to enjoin the defendants from using any combination of the names Farrand and Williams as a part of their firm name, and from receiving and appropriating any letters, packages, or other thing addressed upon the outside to Farrand, Williams & Co., or to Farrand & Williams, or to Farrand Williams, and to require them to turn over to complainants any letters, packages, or other thing so addressed which may come to their hands; also to enjoin them from in any way interfering with the business of the complainants as successors of the firm of Farrand, Williams & Co., and from interfering in any way with their receiving and enjoying the business which belonged to the firm of Farrand, Williams & Co., and from interfering with the continuance of said business by complainants; and that they be perpetually enjoined from using or simulating any trade-marks, trade-names, brands, labels, or monogram used by the firm of Farrand, Williams & Co., and for general relief.

The bill of complaint alleges that the complainants are doing business under the firm name of Williams, Sheley & Brooks, as successors to Farrand, Williams & Co. The answer of the defendants admits that the complainants are copartners doing business under the firm name of

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Williams, Sheley & Brooks, and that they advertise themselves as successors of Farrand, Williams & Co., but denies that they are the legal successors of Farrand, Williams & Co., and that they have the legal right or claim to be such successors.

The bill further states that the defendants are partners doing business under the firm name of Farrand, Williams & Clark, and that they are using said firm name against the rights and equities of the complainants. The defendants, in their answer, admit that they are doing business under the firm name of Farrand, Williams & Clark, but deny that they are using such firm name against the rights and equities of the complainants.

The bill charges that from 1860 to 1870 Alanson Sheley, William C. Williams, and Jacob S. Farrand were partners in the wholesale drug business under the firm name of Farrand, Sheley & Co., in the city of Detroit; that in 1870 the style of the firm was changed to Farrand, Williams & Co.; that defendant Clark was admitted into the firm in 1870; that Richard P. Williams purchased an interest in the firm owned by James E. Davis, and was admitted as a partner, and continued as such from 1880; that in 1884 Jacob S. Farrand, Jr., and Alanson Sheley Brooks were admitted into the firm; and that in January, 1890, the interests of the several partners in the firm were as follows, the whole capital stock being $200,000: Jacob S. Farrand owned three-twentieths; Alanson Sheley, three-twentieths; William C. Williams, five-twentieths; Harvey C. Clark, two-twentieths; Richard P. Williams, three-twentieths; Jacob S. Farrand, Jr., two-twentieths; and Alanson Sheley Brooks, two-twentieths; that, notwithstanding the addition and change of partners in the business, the firm name continued the same from 1870 until the dissolution by sale hereinafter stated, in 1890, the firm name being all that time Far-

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rand, Williams & Co.; that this firm had done business at the corner of Larned and Bates streets, in Detroit, from the year 1872 down to the time of the dissolution, in 1890; that the building was erected and owned by Jacob S. Farrand and Alanson Sheley, and the said firm also occupied a store-house on Bates street, adjoining, which store-house, and the land on which it was erected, was owned as follows: Alanson Sheley, one-fourth; Jacob S. Farrand, one-fourth; William C. Williams, one-fourth; Harvey C. Clark, three-twentieths; and Richard P. Williams, two-twentieths; that from the year 1880 the fiscal year of the firm ended on the 1st of January each year, inventory being taken soon after that date annually, and the profits being ascertained according to the respective interests; that there was no new agreement that the firm should continue for another year, but the firm and business went on from year to year by common consent.

The bill further alleges that on the 25th day of January, 1890, the defendant Jacob S. Farrand delivered to Alanson Sheley a certain instrument in writing, of which the following is a copy:

"DETROIT, January 25, 1890.

"J. S. Farrand, R. P. Williams, J. S. Farrand, Jr., H. C. Clark, will pay Messrs. Sheley & Brooks, for their interest in the firm of Farrand, Williams & Co., the amount of their interest being fifty thousand dollars ($50,000), the sum of sixty thousand dollars ($60,000), or they will take for their interest, the amount being one hundred thousand dollars ($100,000), the sum of one hundred and twenty thousand dollars ($120,000), the same to be paid in cash, or in notes acceptable to the parties who sell, one week from to-day, Saturday, the first day of February next; the store to be leased to the party purchasing for a term of five years at a rent of eight thousand dollars ($8,000) a year, and the warehouse to be rented to the party purchasing at a net rental of six per cent. a year on the cost of their interest therein. In case Messrs. Sheley and Brooks sell, the accounts of Mr.

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and Mrs. Brooks and George A. Sheley are to be paid at the time of the transfer of their interest."

On the back of this instrument was the following indorsement:

"DETROIT, January 25, 1890.

"We hereby agree to carry out the memorandum agreement on the other side of this paper as therein stated.

"J. S. FARRAND.
"R. P. WILLIAMS.
"J. S. FARRAND, JR.
"H. C. CLARK."

Below which was indorsed the following:

"I hereby agree to carry out the memorandum agreement on the other side of this paper as therein stated.

"A. SHELEY."

That afterwards said Alanson Sheley accepted the proposition made by said defendants which was contained in said instrument, and purchased from said defendants all of their right, title, and interest in the said firm of Farrand, Williams & Co. upon the terms in said instrument mentioned; and on the 1st day of February, 1890, the defendants duly sold all their right, title, and interest in the firm of Farrand, Williams & Co. to said Alanson Sheley for the sum of $120,000, on that day paid to them, and in evidence of said sale the said defendants on the 1st day of February executed under their hands and seals and delivered to the said Sheley a certain instrument in writing, of which the following is a copy, namely:

"*Know all men by these presents*, that we, Jacob S. Farrand, Harvey C. Clark, Richard P. Williams, and Jacob S. Farrand, Jr., of the city of Detroit, in the county of Wayne, and State of Michigan, of the first part, for and in consideration of the sum of one hundred and twenty thousand dollars, lawful money of the United States, to them paid by Alanson Sheley, of the city, county, and State aforesaid, of the second part, the

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receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, his executors, administrators, or assigns, all our right, title, and interest in the firm of Farrand, Williams & Company. This does not include any real estate they may own.

"To have and to hold the same unto the said party of the second part, his executors, administrators, and assigns, forever. And the said parties of the first part, for themselves, their heirs, executors, and administrators, do covenant and agree to and with the said party of the second part, his executors, administrators, and assigns, to warrant and defend the sale of said property, goods, and chattels hereby made unto the said party of the second part, his executors, administrators, and assigns, against all and every person or persons whatsoever.

"In witness whereof we have hereunto set our hands and seals, this first day of February, one thousand eight hundred and ninety (1890).

"J. S. FARRAND. [L. S.]
"HARVEY C. CLARK. [L. S.]
"R. P. WILLIAMS. [L. S.]
"J. S. FARRAND, Junior. [L. S.]

"Signed, sealed, and delivered in presence of
"F. J. STEVENS.
"FRANK A. LUCE."

This allegation of the bill is admitted by the answer of the defendants.

The bill further alleges that it was the intention of the defendants, in making said proposition evidenced by the said writing dated January 25, 1890, either to sell all their interest in said firm of Farrand, Williams & Co., or to buy all the interest of the complainants said Alanson Sheley and said Alanson Sheley Brooks in the said firm of Farrand, Williams & Co.; and that it was further the intention of all the parties to said proposition, and of all the parties to said purchase and sale, that whichever party should purchase the interests of the others in the said firm should continue the business then being conducted by the said firm at its then place

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of business or stand; and that it was well known to the said defendants, and was intended by them when the said proposition was so made, that the complainant the said William C. Williams should remain with whichever party to the said proposition should purchase the interests of the others in the said firm of Farrand, Williams & Co., and should join the purchasers in the continuance of the business of the said firm at said stand; and that it was also known and intended by all the parties to the said proposition that, in case the said Alanson Sheley should purchase the interests of the said defendants in the said firm, and so continue the business of the said firm at its said site, the complainant the said Alanson Sheley Brooks should be associated with said Alanson Sheley and the said William C. Williams in the said business, and that the interests in the said firm, so purchased, should be distributed among them as they might agree. Replying to these allegations of the bill, the defendants claim that their negotiations were carried on with Alanson Sheley personally, and that they had no negotiations or agreement in regard to the continuance of the business with William C. Williams; that he was not a party to the negotiations or sale; that there was no arrangement or understanding or intention on the part of the defendants in regard to the future business of William C. Williams, or as to whether he should remain with the complainants; that Alanson Sheley, personally and individually, was the party to whom they agreed to sell, and who agreed to become the purchaser, and who paid the consideration, and that nothing was said by the defendants or any of the complainants respecting the manner in which the complainants should carry on said business after the purchase by the said Sheley, or as to whether William C. Williams should be a partner with Sheley or with Sheley and Brooks.

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The bill further alleges that upon the execution of the bill of sale above set forth, dated February 1, complainants Will ams and Brooks received transfers of and paid for shares of the rights, property, and interests so purchased, and complainants entered into a copartnership on that day under the name of Williams, Sheley & Brooks, in which Sheley and Brooks were each to have a quarter interest and Williams a half interest in the firm; which firm has continued the business of said firm of Farrand, Williams & Co. at the said stand. The defendants deny any knowledge of this statement contained in the bill as to the purchase of shares by Will ams and Brooks and the formation of the partnership by Williams, Sheley, and Brooks. They admit that the complainants entered into a partnership under the name of Williams, Sheley & Brooks, and that they advertised themselves as the successors of Farrand, Williams & Co., but without any legal right or claim to be such successors.

The complainants charge in their bill that they were put in possession by defendants of the premises occupied by Farrand, Williams & Co., and the assets of said firm, and that they have since continued therein as successors of Farrand, Williams & Co., except as they have been interfered with by the defendants; that they have advertised themselves as the successors of Farrand, Williams & Co. The defendants deny that they are such successors. They deny that they put the complainants in possession, and they deny that they have acquiesced in the claim of the complainants that they are the successors of Farrand, Williams & Co. They also deny that they have interfered with the complainants making such a claim.

The complainants further state that on the 1st day of February, 1890, the firm of Farrand, Williams & Co. was indebted to various persons in an amount exceeding

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$55,000, and that it was the intention and legal effect of the said purchase and sale that the complainants should assume and pay all of the said indebtedness, and that they gave to the retiring partners a memorandum in writing, to the effect that said retiring partners were released from the liabilities of the said firm; and they further state that they have paid all of the said indebtedness which has matured since said date. The defendants, in their answer, admit the indebtedness of Farrand, Williams & Co., and state that the same was considered in fixing the price at which defendants were to sell to Sheley. They deny that it was the intention or legal effect of such sale that the complainants should pay said indebtedness, and they deny that the complainants gave to the defendants said written memorandum.

The bill further states that on February 1 the annual inventory had been taken, and when they bought all the right, title, and interest in the said firm of Farrand, Williams & Co. of the defendants, the retiring partners, the profits for the fiscal year had been ascertained and paid to the members of the firm in money or notes, in the manner customary with the firm, and the capital stock of the firm stood at the sum of $200,000; that the shares therein of the defendants aggregated one-half thereof, or the sum of $100,000; that in the proposition of sale made by the defendants, and in the price of $120,000 so paid to them, there was included the sum of $20,000 in addition to the par value of their aggregate shares of the capital stock as a bonus or consideration for their share of the good-will of the said firm, and for their share of those certain valuable rights appurtenant to the name and business of said firm, and which all parties to the said purchase and sale intended should be sold with the other assets of said firm, and should be

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acquired, possessed, and enjoyed by the purchasers, among which the complainants claim were the following valuable rights and appurtenances:

First. That the said firm of Farrand, Williams & Co., during the twenty years of its existence, had built up an extensive trade, and had secured a name and reputation with its customers and with manufacturers and dealers from whom said firm obtained its stock in trade, which was of great value and advantage to said firm, and would be of great value to its lawful successors.

Second. That the firm was broadly known to the drug and other trades throughout the United States by advertisements in pharmaceutical, medical, and trade journals; that its name appeared in trade circulars, directories, and commercial reports printed in the trade centers of the world, as an instance of which they cite "The Annual of Chemical Products and Drugs," published in Paris, in the French language, having a large circulation, and thus reaching dealers and producers everywhere; that said firm purchased goods extensively in England, France, and Germany, and that its name was reputably known to the trade in those countries; that it was a great advantage to said firm that its name was so widely circulated; that valuable discoveries were constantly making in the sciences and trades to which its business related; that new remedies and new goods were constantly appearing and being placed on the market, and the attention of said firm called to them through the instrumentality of letters and circulars received through the mails, addressed to said firm, because its name appeared in said trade circulars, directories, and commercial reports; that for a long period of time, and because many of such directories are published and circulated but annually, it is probable that the name of Farrand, Williams & Co. will appear therein, and that advertisements of new preparations, remedies, and manufactures will continue to be sent by mail to said firm of Farrand, Williams & Co., and that the right to receive the same is a valuable right.

Third. That the firm of Farrand, Williams & Co. manufactured or had manufactured for it a large number of pharmaceutical and proprietary preparations, with which the name of the firm was directly connected, and which were made and placed upon the market by no other dealer in drugs, and which in the drug trade were

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known to be a part of the business of said firm; that certain of said preparations were named as follows: "Conger's Regulator," "Conger's Liver Pills," "Farrand's Extract of Jamaica Ginger," "Farrand's White Rose Tooth Powder," "Davis' Carbolic Oil Liniment;" and that there were other of said preparations; that the exclusive right to sell said remedies was possessed by the said firm, and that said right was valuable, and would be valuable to its lawful successors.

Fourth. That the firm was also largely engaged in the manufacture and sale of medical fluid extracts; that it sold many tons thereof yearly, and that they were well and favorably known to the trade as "Farrand, Williams & Company's Fluid Extracts;" that physicians, in prescribing fluid extracts as component parts of prescriptions, commonly designate fluid extracts of a manufacture with which they are familiar, on account of the variations in strength and efficiency in extracts made by different manufacturers; and that Farrand, Williams & Co.'s fluid extracts were widely known by physicians to be of uniform strength, and were largely prescribed for that reason; and that said extracts were commonly ordered and referred to in the trade by the use of the abbreviations "F., W. & Co.;" and that said name and abbreviations became valuable trade-marks, possessed by said firm, and which passed to the legal successors of said firm.

Fifth. That the firm dealt in certain ochres, which were known as "Farrand, Williams & Co.'s Ochres," and in other goods which were distinctly known and referred to in the trade in connection with the name of said firm.

Sixth. That goods were generally shipped to said firm addressed to "F., W. & Co.;" that said abbreviation was used upon the labels of said firm, and was blown into the bottles used by it.

Seventh. That the said firm possessed certain exclusive and valuable agencies; that it was the duly-appointed exclusive agent for Michigan of J. C. Ayer & Co., of Lowell, Mass., for the sale of "Ayer's Sarsaparilla" and "Ayer's Pills," and the other medical preparations of the said Ayer, and was also the exclusive agent for Michigan of the Peninsular White Lead & Color Works, of Detroit, selling the products of said works through traveling agents of said firm at a profit.

Eighth. That the firm also had manufactured for it certain other goods in the line of its trade, which were

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sold exclusively by said firm under a name or brand adopted by said firm, which became a trade-mark of said firm; and in particular that said firm dealt in certain lyes, which were made expressly for said firm, and for no other dealers, which were well known to the trade by the names "Castle Lye" and "Empire Lye," and that the exclusive right to sell said brands of lyes was valuable.

Ninth. That the firm for many years had used a monogram, composed of the letters "F. & W.," and the abbreviation "Co." placed within them; and that said monogram was well-known to the trade as representing the name of said firm.

The complainants further allege in their bill that by the said purchase and sale they have become the lawful successors of the said firm of Farrand, Williams & Co., and entitled to the use of the said firm name, and to advertise themselves as the successors of said firm, and become entitled to all the trade-names, trade-marks, brands, agencies, *formulæ*, monograms, and exclusive rights hereinbefore referred to, and all other rights pertaining to or arising out of the name or business of said firm of Farrand, Williams & Co.

The defendants deny that the complainants bought all the right, title, and interest of the defendants in the firm of Farrand, Williams & Co. They admit that the annual inventory had been taken prior to the sale to said Sheley, the profits for the fiscal year had been divided, and the capital stock was inventoried at $200,000, one-half of which fell to the defendants. They deny that the $120,000 paid by the said Sheley for said interest included any bonus or consideration for defendants' share in the good-will of the firm, or their share in any rights appertaining to the name and business of said firm, or that it was intended that the defendants' interest in such good-will or the right to use the name of Farrand, Williams & Co. was sold or included in the defendants' transfer to said

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Sheley. They show that the bill of sale first prepared by and under the direction of Sheley included by name the good-will of the said firm, and that the defendant Clark expressly refused to execute said bill of sale or any bill of sale which included said good-will; that subsequently the words "good-will" were stricken out of said bill of sale, and were afterwards erased, and that subsequently, by mutul consent, a new bill of sale was drawn under the direction of said Sheley, and executed by the defendants; and they aver that it was expressly understood by the defendants and said Sheley that said defendants would not and that they did not by said bill of sale convey or intend to convey to said Sheley defendants' interest in the good-will of the firm of Farrand, Williams & Co., or in the name of said firm, or the right on the part of Sheley or his assigns to do business as the successors of said firm. They admit that Farrand, Williams & Co. had built up an extensive trade and reputation, but whether the same would be of value to its successors would depend upon the character and business reputation of the successors. They admit that new goods are constantly appearing and being placed on the market through the instrumentality of letters and circulars received by said firm, and that said advertisements may be sent to Farrand, Williams & Co. by mail, but deny that the right of receiving said advertisements is of any particular value. They admit that Farrand, Williams & Co. manufactured certain preparations mentioned in the bill, but do not admit that the exclusive right to sell such preparations was possessed by said firm. They deny that the name or abbreviations used by the firm of Farrand, Williams & Co. were valuable trade-marks, or that the same passed to the complainants. They admit that Farrand, Williams & Co. had dealt in ochres known as "Farrand, Williams & Co.'s Ochres," and that goods

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were frequently shipped, addressed to "F., W. & Co.," and that said abbreviation was used on labels; but they deny that the abbreviation constituted a trade-mark. They admit that the firm was agent for J. C. Ayer & Co., but claim that such agency was revocable at any time, and they deny that it was transferred to the complainants. They admit that the firm manufactured certain goods; that the same sold by the name or brand adopted by the firm, but they deny that the same became a valid trade-mark. They deny that the names "Castle" and "Empire" constitute valid trade-marks, or that the right to sell lyes under said brands could be made exclusive to said complainants. They admit that the said firm used a monogram, but deny that the same constituted a valid trade-mark.

The complainants further charge in their bill of complaint that said William C. Williams is the person whose name was included in the firm name of Farrand, Williams & Co.; that said combination of names became a valuable trade-mark or trade-name; that his name contributed as much to the value of said combination as did the name of said Farrand; and that he has never sold or otherwise parted with his interest in the said combination of names, but, on the contrary, the complainants have purchased and paid for the interest of said Farrand therein. And they claim that it is inequitable and unlawful for the said Jacob S. Farrand and the other defendants to continue to use the name of said Farrand in combination with that of Williams to create a firm name which so closely resembles the name of the former firm of Farrand, Williams & Co. as to deceive the public, and deprive the complainant William C. Williams of the value to him of the use and combination of his name with that of Farrand.

The defendants, in their answer, admit that William

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C. Williams' name was used in the firm name of Farrand, Williams & Co., but they allege that Richard P. Williams was also a member of said firm, and that on the letter-heads and stationery used by the said firm the name of Richard P. Williams appeared as well as the names of the other members of the firm. They deny that William C. Williams' name contributed as much to the value of the firm name of Farrand, Williams & Co. as did the name of Jacob S. Farrand, who had been engaged in business, and had acquired a reputation, before said William C. Williams became interested therein. They allege that William C. Williams knew of the sale made by the defendants to said Sheley, and did not object to the sale or dissolution of the firm of Farrand, Williams & Co., which resulted therefrom. They further allege that the said Jacob S. Farrand, Jacob S. Farrand, Jr., Richard P. Williams, and Harvey C. Clark have the legal and equitable right to use their own names in any legitimate business, as individuals or in connection with each other as a firm. They deny that they have used their names so as to interfere with any legal right said William C. Williams, the complainant, may have to the use of his own name; and they deny that he has a right to use the name of said Farrand in combination with his own name or otherwise.

The complainants further allege in their bill that the distinctive names in the firm name of Farrand, Williams & Co. were the names of Farrand and Williams, and they allege that letters were frequently received by the firm of Farrand, Williams & Co. which were addressed to Farrand & Williams, or to Farrand Williams, or to Williams & Farrand, or to William Farrand, and that letters continue to come so addressed; that on or about the 9th of April, 1890, the complainants received a letter addressed to Farrand & Williams; that on or about the 1st day of

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April they received a postal-card addressed to Williams, Farrand & Co.; that on the 4th day of April they received a letter addressed to Farrand & Williams; that about the same time they received another letter addressed to Farrand & Williams; that on or about the 24th of March, 1890, they received a postal-card from Cleveland, addressed to Farrand & Williams; that on or about the 23d of March they received a letter from Norwalk, Ohio, addressed to Farrand & Williams; that on or about the 1st day of April they received a letter from Detroit, addressed to Farrand Williams; that on the 28th of March they received a letter addressed Farrand, Williams & Brooks; that all the letters so received were letters pertaining to business to be transacted by complainants; and that in all such cases the senders of such letters believed they were dealing with the firm of Farrand, Williams & Co. and their lawful successors. They also set out a great number of like instances.

They further charge that, notwithstanding they purchased all the right, title, and interest of the said defendants in the said firm of Farrand, Williams & Co., and paid them a large bonus or consideration for the right to become successors of said firm, and to have and enjoy a continuance of the business of said firm and the rights before mentioned, and although the said William C. Williams has never parted with his interest in the combination of his name with that of the defendant Farrand, yet the said defendants, inequitably and unlawfully contriving to deprive the complainants of the value of the property and rights so acquired and possessed by them, and to gain the benefit of the combination of the names Farrand and Williams, have commenced a business at Nos. 32 and 34 Woodward avenue, in the city of Detroit, as near in character as possible to the business which

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was conducted by the said firm of Farrand, Williams & Co., and which is being continued by the complainants, and have assumed the firm name of Farrand, Williams & Clark, and by the assumption of said firm name, and by various devices and means hereinafter set forth, have attempted to lead the public to believe that said firm of Farrand, Williams & Clark were the successors of said firm of Farrand, Williams & Co., and to withdraw from the complainants and secure for themselves business which otherwise naturally would have fallen to the complainants as successors of said firm of Farrand, Williams & Co.

The defendants, answering, deny that complainants ever purchased the interest of the defendants in the firm of Farrand, Williams & Co., or paid a bonus or consideration for the right to become the successors of said firm, or to continue its business. They deny that William C. Williams has not parted with his interest in the combination of the names of Farrand and Williams. They admit that they have commenced business, as stated, under the name of Farrand, Williams & Clark. They deny that in doing so they have contrived to deprive the complainants of any rights to which they are entitled, and they deny that by the assumption of said firm name defendants have sought to lead the public to believe that they are the successors of Farrand, Williams & Co., and deny that they have sought to secure to themselves business by means or devices which they are not legally entitled to employ, or that they have attempted to interfere with the complainants doing business under the firm name of Williams, Sheley & Brooks.

The complainants charge that Farrand, Williams & Co. used a blue envelope, with the firm name printed at the corner, with the customary request for return; that no other jobber in drugs in Michigan used a blue envelope; that such

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envelope, so printed, was well known to the trade, and indicated a letter from Farrand, Williams & Co.; that, intending to deceive the public, defendants have adopted and are using an envelope of the same color and size, and that the printing thereon is arranged as nearly as possible as upon the envelope of said firm of Farrand, Williams & Co. The defendants, in their answer to this charge, admit that Farrand, Williams & Co. used a blue envelope, and that defendants also used blue envelopes and white ones. They deny that the use of such blue envelopes is calculated to deceive the public, or that they were intended to deceive; and deny the other charges with reference to such envelopes.

The complainants further charge in their bill of complaint that the defendants contrived by the arrangement of their firm name to have it resemble as nearly as possible the name of Farrand, Williams & Co.; that upon their letter-heads the defendants' names are in the following order: Jacob S. Farrand, Harvey C. Clark, Richard P. Williams, Jacob S. Farrand, Jr.; that said Clark has been engaged in the drug business a longer time than Richard P. Williams, and ordinarily his name would precede that of Richard P. Williams in the adoption of a firm name; that the defendants have placed purposely the name of said Williams before that of Clark in the firm name, in order that the combination might lead the public to believe that they were the old firm of Farrand, Williams & Co.; and they aver that defendants are actually making use of the name of Farrand, Williams & Co.; that on April 8, 1890, they addressed a letter to W. Parks, of Reese, Mich., signed "Farrand, Williams & Co." Defendants, in their answer, deny that in adopting their firm name defendants intended to adopt a name resembling as nearly as possible the name of Farrand, Williams & Co.; that the arrangement of the names was

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for convenience and euphony. They deny that the name of Richard P. Williams was placed before that of said Clark for the purpose of leading the public to suppose that the firm was the old firm of Farrand, Williams & Co. They deny that they adopted their firm name for any fraudulent purpose. They admit writing a letter to Parks, and that it was signed "Farrand, Williams & Co." through mistake and inadvertence of the defendant Clark.

The complainants charge that the defendants have enticed certain traveling salesmen formerly employed by Farrand, Williams & Co. from the employment of the complainants into the employment of defendants. The answer denies this allegation, and states that the salesmen solicited employment from defendants without any suggestion on their part.

The bill further alleges several specific acts of the defendants, which complainants claim were intended to and did deceive the public, and lead them to believe that Farrand, Williams & Clark were the successors of Farrand, Williams & Co., and that the public were misled thereby.

The testimony was taken in open court, as in suit at law, and, while it is not my purpose to refer at any great length to the testimony introduced in the case upon either side, some of the testimony will be referred to in the course of my opinion.

The gist of the complaint is that by the purchase of the defendants' interests in the stock and business of the firm of Farrand, Williams & Co. the complainants obtained and are entitled to what is sometimes designated as the "good-will" of the firm of Farrand, Williams & Co., and that they had a right to succeed to the trade and business carried on by that firm, and to hold themselves out to the public as the successors of Farrand, Williams & Co., and to receive all the benefits to be

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derived from that position, including the receiving and opening of the mail addressed to Farrand, Williams & Co.

The first question, therefore, to be determined is whether the complainants did purchase of the defendants what is usually denominated as the "good-will" pertaining to the old firm of Farrand, Williams & Co., and the right to denominate themselves as successors to such firm; and to arrive at a correct solution of this question it is necessary to consider the contract and negotiations entered into between the parties; and first I may say that, in view of the circumstances surrounding the transaction, I have no hesitation in reaching the conclusion that Alanson Sheley represented, to all intents and purposes, the firm of Williams, Sheley & Brooks, the complainants in this case. Those facts and circumstances show that Mr. Sheley, at his age and condition of life, did not intend to make this purchase for himself individually, but that the defendants knew, from all the surrounding facts and circumstances, that he was acting for himself and Mr. Brooks, and that Mr. Williams, the complainant, would go with and be concerned in business with whichever party should finally make the purchase. So it is unnecessary to consider the point raised by the defendants that this sale was made to Alanson Sheley individually, and that he could not convey, even if he purchased the good-will of the partnership, that incident of the purchase to the firm of Williams, Sheley & Brooks.

It is claimed on the part of the complainants that by virtue of the bill of sale executed by the defendants to Alanson Sheley the good-will of the firm of Farrand, Williams & Co. was conveyed to Alanson Sheley, and, in effect, to them. The bill of sale referred to, which bears date the 1st day of February, 1890, states that, in consideration of the sum of $120,000, the defendants, by the name of J. S. Farrand, Harvey C. Clark, R. P. Will-

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iams, and J. S. Farrand, Jr., thereby granted and conveyed unto the said Sheley, his executors, administrators, or assigns, all of their right, title, and interest in the firm of Farrand, Williams & Co., not, however, including any real estate which they owned. The complainants insist that this bill of sale includes in its terms what is known as the "good-will" of the firm, and in support of their position they point to the facts and circumstances which preceded the execution of the bill of sale, and which tend to throw light upon what property was intended to be conveyed by it. They point to the fact that the inventory which had been recently completed, and which formed the basis of the sale between the parties, inventoried at the sum of $200,000, which covered all the property of a personal nature belonging to the firm. They also point to the fact that Mr. Jacob S. Farrand, in his offer for sale or purchase, included therein as a purchase price 20 per cent. upon the value of the property as inventoried. This, they claim, was intended to cover the good-will of the firm,—that property, intangible in its nature, and which, as they claim, formed an asset of the firm which was not included in the inventory. They claim further that it was intended to cover the benefit and advantage which would accrue to the partners who bought the concern as a going concern in continuing its business at the old stand, which is one of the elements included in the term "good-will."

On the contrary, the defendants insist that it was not intended to convey to the complainants or to Sheley what is known as the "good-will" of the old firm of Farrand, Williams & Co.; and they claim, and one of them so testified, that the 20 per cent. included in the purchase price above the amount of the inventory was merely included for the reason that the outgoing partners would necessarily be out of business for more or less time, and

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it was intended including this advance in the purchase price to afford them something to live upon in the mean time. But further, and more significant than that, they claim, and it is not disputed, that the first bill of sale, prepared under Mr. Sheley's direction, and which was signed by Mr. Farrand and Mr. R. P. Williams, included in its very terms the expression, "and the good-will attendant upon said firm's business;" that this was struck out of the bill of sale and erased, upon objection made by Mr. Clark, one of the partners, and that the bill of sale that was actually executed did not contain that expression.

This leads us to an examination of the facts, in order to determine the intent of the parties in striking out from the bill of sale the words referred to. The testimony shows that when the first bill of sale was prepared and presented to Mr. Clark for his signature after Mr. Jacob S. Farrand and R. P. Williams had signed it, upon reading it over he objected to the words quoted above, for the reason, as he stated in his testimony when taken in open court, that he was not very well acquainted with legal phraseology, and he feared that if those words remained in the bill of sale it would prevent him from engaging in business of the kind which he was then engaged in. This was his sole and only reason for wishing those words to be erased from the bill of sale. Upon the fact being brought to the attention of Mr. Sheley that Mr. Clark objected to those words in the bill of sale, he directed that they be stricken out, for the reason that he was unacquainted with the legal significance of those words, and supposed that they had no other meaning than a good wish or good will on the part of Clark for the success of the purchaser in carrying on the business; and, so regarding them, it appears that he called upon the mother of Mr. Clark and stated to her that he was

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surprised that her son, between whom and himself had always existed the most kindly and friendly feeling, should not be willing to wish him good luck; but, as Mr. Clark objected to the words, he directed Mr. Stevens to scratch out that good-will, saying that it did not make any difference to him; that he knew Mr. Clark had good wishes for him; so it was struck out. It therefore appears, respecting this change in the language in the bill of sale, that neither Mr. Sheley nor Mr. Clark understood the legal significance of the term, and both supposed it to amount to something different from what the actual significance is when applied to a business carried on by a person or firm; and it appears to me from the testimony that it was the intention of the parties at the time of the sale and purchase the one to purchase, and the others to convey, the good-will of the firm of Farrand, Williams & Co.; and, in order to understand this position more fully, it were perhaps well that we should define what we understand by the term "good-will of a business."

The good-will of a business is the property of the firm, since it is the result of the joint labors of the partners. It includes within its signification the reputation of the firm for fair dealing and probity. It is more extended in its signification at the present day than it was in the time of Lord Eldon. The manner of conducting business has changed since that day. Wholesale houses now carry on the mass of their business by means of agents or persons soliciting trade, or through the medium of the mails; and customers rarely, if ever, visit the place of business. We think that the definition given by Story in his work on Partnerships, at section 99, is a fair one. He describes "good-will" as being—

"The advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock,

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funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices."

See, also, *Carey v. Gunnison* (Iowa), 17 N. W. Rep. at page 885. As showing the later view entertained of the term "good-will" in the English courts, I quote what was said by the court in the case of *Churton v. Douglas*, Johns. Eng. Ch. 174:

"It was argued that in *Shackle v. Baker*, 14 Ves. 468; *Cruttwell v. Lye*, 17 Id. 335; and *Kennedy v. Lee*, 3 Mer. 452, —Lord Eldon has laid down the principle that an assignment of the good-will of a trade *simpliciter* carries no more with it than the advantage of occupying the premises which were occupied by the former firm, and the chance you thereby have of the customers of the former firm being attracted to those premises; but it would be taking too narrow a view of what is there laid down by Lord Eldon to say that it is confined to that. 'Good-will,' I apprehend, must mean every advantage—every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business. * * * It would be absurd to say that where a large wholesale business is conducted the public are mindful whether it is carried on at one end of the Strand or the other, or in Fleet street, or in the Strand, or any place adjoining; and that they regard that, and do not regard the identity of the house of business, namely, the firm."

Such good-will is measured by the value placed upon that which may be so special about a business, or the mode of conducting it, or the place in which it is con-

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ducted, as to give it peculiar prominence and profit in the estimation of business men. *Fay v. Fay* (N. J. Ch.), 6 Atl. Rep. 12. So, in applying the signification of the term to the sale of the defendants' interests in the firm of Farrand, Williams & Co., it is proper to consider the facts with reference to the situation of the firm at the time the sale was made. It had been a long time in existence, and had acquired a reputation among business men in the trade throughout the United States, and seems to have been regarded as one of the leading firms in that business in the country. The contract between the parties was that the purchasers should continue the business at the stand then occupied by Farrand, Williams & Co. for a term of five years. It was known to all the partners that persons who had been in the habit of dealing with this firm would, for a considerable time at least, continue to address their communications to Farrand, Williams & Co., as they had been in the habit of doing in the past. That was an interest in the firm which was valuable, and which, by the bill of sale, passed to the purchaser. Moreover, it is difficult to escape the conclusion that the added price above the inventory was to cover the value of just such property as that which I have been describing.

The testimony shows that complainants claimed the right, immediately upon the purchase, of advertising themselves as the successors of the firm of Farrand, Williams & Co.; that they had their name, with that appellation, added immediately upon the bill-heads and the letter-heads and upon the envelopes which they had purchased from the retiring partners under the bill of sale mentioned. It is also in evidence that the defendants, until they filed their answer in this case, did not claim the right to receive and open the correspondence addressed to Farrand,

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Williams & Co., but that, when they did so by mistake, they forwarded such correspondence to the complainants in this case.

The testimony shows that the property included in the inventory which the complainants purchased consisted not only of the drugs, medicines, paints, glassware, etc., on hand, but the bills receivable and the "Conger Regulator" trade-mark; and, further, packages, price catalogues, bottles, and bottle-moulds were inventoried, as well as the printed matter, labels, wrappers, and circulars. This printed matter was inventoried at $1,000, and the glassware having the "F., W. & Co." or Farrand, Williams & Co., imprint, at $5,000. And, as further bearing upon the question as to what was sold by defendants and purchased by complainants, it is proper to take into account and consider the negotiations which preceded the actual execution of the bill of sale of date February 1, 1890. It appears in evidence that the talk about the sale of the property commenced some time in the month of January, at which time Mr. Farrand, Sr., proposed to sell out, or in some way bring about a dissolution of the firm. Mr. Sheley refused to consider any offers until after the inventory was completed, and they ascertained the value of the stock on hand and the property belonging to the firm. This was finished in January, just previous to the time when the first proposition, of date January 25, was made in writing by Mr. Farrand, Sr., to Mr. Sheley. That proposition was considered, and was finally accepted on the 27th day of January, at which time it was agreed that the retiring partners should remain and work for the new firm until the first of the next month, —February. Immediately upon the acceptance of the proposition $2,000 was paid down, and the complainants, among themselves, formed the new firm of Williams, Sheley & Brooks; and immediately the stationery, con-

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sisting of envelopes, letter-heads, bill-heads, etc., was piled in large baskets, and sent to the printers, and the firm name, "Williams, Sheley & Brooks, Successors to Farrand, Williams & Co.," was printed upon them, and they were returned on the 29th, and were used in the store while the defendants were still there. In addition to this, Mr. Farrand testified, when pressed upon cross-examination, that he had no doubt there would some one go on with the business; and that the purchase was made, as he understood it, "in the sense that the business was to be carried right on by their concern as successors of the old concern." I have already called attention to the fact that the offer of sale included a lease of the store for five years and the warehouse to the purchasing party.

The complainants testify that the purchase was that of a going concern, and that they were to continue the business as the successors of Farrand, Williams & Co.; and, when all the facts and circumstances concerning the transaction of the sale and delivery are considered, there can be no doubt but that the purchase by the complainants included the right to continue the business at the old stand, the right to advertise themselves as the successors of the old firm, and the right to use the monogram "F., W. & Co." and the name "Farrand, Williams & Co." blown in the bottles, and all the trade-marks and *indicia* made use of by the firm of Farrand, Williams & Co. as an advertising medium to the public to indicate the proprietorship of the articles manufactured by them under the names which were then in vogue in the business.

It is strenuously contended by counsel for the defendants that, if the good-will was sold by them, it was sold to Alanson Sheley individually, and therefore the firm of Williams, Sheley & Brooks had no right to the good-will

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of the old concern, for the reason, as alleged, that the covenant by which the property was conveyed to Sheley was personal, and the good-will of the old concern was not assignable. I have already stated that the testimony shows without doubt that, although Mr. Sheley negotiated the purchase in his individual name, yet it was well understood by all the parties that he was making the purchase for the benefit not only of himself, but of Mr. Williams, and also of his grandson, Mr. Brooks. This is evident from what transpired during the negotiations. In the first place, it appears from the testimony that Mr. Williams, the complainant in this suit, did not desire to sell his interest in the partnership, whoever of the partners sold their interest to their copartners; that he desired to continue in the business, and was willing to remain in the business with the purchaser; and that all parties also were willing that he should do so. This is evident from the proposition that was first made by Mr. Farrand, which was signed by each of the defendants individually, and stated that they would pay Messrs. Sheley and Brooks for their interest in the firm of Farrand, Williams & Co., or they would take for their interest, a certain amount stated. In these propositions Mr. William C. Williams' name is not mentioned, thus corroborating the testimony of Mr. Williams and others that he was willing to continue in business with the purchasing party. It also further shows that these parties who made the proposition well knew that Mr. Sheley was not intending to purchase individually, for their proposition was made to Sheley and Brooks; and that, coupled with the understanding that Mr. William C. Williams would continue with the purchasing party, demonstrates that they knew, and that the parties all intended, that the sale should be made to the three persons who compose the present firm of the complain-

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ants, and that Mr. Sheley was merely acting in their interest and behalf. Further than this, after that proposition was accepted by Mr. Sheley as an individual, and the complainants had inaugurated their firm, and agreed upon the firm name of Williams, Sheley & Brooks, and before the bill of sale was executed, the policies of insurance, which had formerly been in charge of Mr. Farrand, were looked over by him, and by him indorsed in behalf of the firm of Farrand, Williams & Co. to the firm of Williams, Sheley & Brooks. The testimony shows that he was some three or four days in making these assignments of the policies, and preparing them for his final signature on the 1st of February. Further than that, it appears that Mr. Farrand, Sr., required that the new firm should give to the retiring partners an undertaking to assume and pay the legal liabilities and obligations existing against the firm of Farrand, Williams & Co., and, although it is true that the defendants denied under oath that such was their requirement, or that any such paper was given, yet upon the witness stand they are forced to admit and to produce the document, which bears date and reads as follows:

"DETROIT, Jany. 31, 1890.

"For value received, we hereby assume all the legal liabilities and obligations against the firm of Farrand, Williams & Co. WILLIAMS, SHELEY & BROOKS."

This shows that they knew, at the time the bill of sale of date February 1 was executed, that they were selling to the new firm of Williams, Sheley & Brooks, the complainants in this suit. The bill of sale, running to Mr. Sheley, individually, was dated February 1, but here is a paper which shows what the mutual understanding and agreement was, in addition to the fact that the policies of insurance were assigned to Williams, Sheley & Brooks; and it is idle for the defendants now to claim

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that their agreement and covenant for the sale of the business of the old firm was made with Mr. Sheley individually, and that, therefore, the complainants in this suit are not entitled to insist that they purchased the property, including the good-will, of the old firm. Immediately after the execution of the bill of sale the complainants advertised themselves as successors of Farrand, Williams & Co. throughout the State, in daily, weekly, and trade journals, and defendants never objected.

The complainants claim that the $20,000 which they paid to the defendants over and above the value of the goods inventoried was intended to cover the rights which they acquired in purchasing the going business of the old firm, and included the good-will of that firm. The defendants do not agree with each other, nor with the complainants, as to what the $20,000 over and above the value of the goods was paid to them for. Mr. Clark testifies that the firm had usually made a profit of about 20 per cent. a year, and that this 20 per cent. was to go to the parties selling, so that they would have something to live on, as by selling out they would necessarily have to remain out of business a certain period. If his version of the matter and the inference to be drawn therefrom are correct, it would seem to show that the parties did not intend to go into business again under a year, if they were receiving from the purchasing party the usual profit of 20 per cent. upon the business. Mr. R. P. Williams, when inquired of repecting what this $20,000 was for, replied, "Mr. Farrand can tell you better than I can," but stated that his view of it was this:

"That there was dissatisfaction, and that was an offer to either give or take; and that the expense of starting a new business would be worth fully $20,000 to start a new business."

He was then asked:

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"*Q.* That the right to go on with that business at that location was worth $20,000?

"*A.* Yes; that is, one-half interest. Mr. Farrand only represented one-half."

Mr. Jacob. S. Farrand testifies that he understood that the bonus of $20,000 was paid and the interest was purchased in the sense that the business was to be carried on by the new concern as the successors of the old firm. Messrs. Sheley, Williams & Brooks all testify that this bonus of $20,000 was for the retiring partners' interest in the going business, in the knowledge that it was to be continued uninterruptedly, with the exclusive right to the use of the name Farrand, Williams & Co.

It appears that during the negotiations which had taken place in December it was suggested by Mr. Farrand that, if they made a sale, they would agree not to go into business again for a term of five years; but this proposition was not accepted, finally culminating in this, which followed in January. The defendants each and all testify that at the time they made the sale, and for some time after, nothing was said between them as to resuming business in the city of Detroit, but it appears from the testimony that soon after the new firm purchased their interests there was casual talk between the retiring partners, and also between them and three, at least, of the former employés of the firm of Farrand, Williams & Co., who, after the dissolution of the old firm, were continued in the employment of Williams, Sheley & Brooks, in which these employés manifested a willingness and a desire to go into the employment of the new firm, if it should be formed by the defendants. These were important agents of the firm of Williams, Sheley & Brooks, as they were traveling salesmen, at least two of them, and had been in the employ of the old firm for a number of years, and were well acquainted with its customers. To transfer their influence to a rival

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firm could not have resulted otherwise than an injury to the firm of Williams, Sheley & Brooks; and, while the defendants deny any effort to entice these employés away from the firm of Williams, Sheley & Brooks, yet they admit that they told them that if they left the employment of Williams, Sheley & Brooks they would be very glad to take them into their service. The motive for doing so is apparent. The result was that, about the 6th or 8th of March following the sale of their interests in the old firm, they formed a new firm under the name of Farrand, Williams & Clark, and entered into a competitive business at 32 and 34 Woodward avenue, Detroit.

With reference to the firm name adopted by the new associates, it appears from Mr. Farrand's testimony that the reason for using the names in the succession which appears in their new firm of Farrand, Williams & Clark was simply for the sake of euphony. He testifies that he thought it was a good name, a natural one, and he suggested it. He was asked this question:

"*Q.* You say, Mr. Farrand, the fact that the names of Farrand and Williams had been connected with the old firm had nothing to do with it? Do you say that, Mr. Farrand?

"*A.* I won't say that it had nothing to do with it. I say that it was familiar, and came naturally to me, and that is the way I answered them."

Mr. Richard P. Williams testifies, with reference to their adopting the name of Farrand, Williams & Clark, as follows:

"It was a family name. I will tell you there was this about it: It had become a family name, and we wished to continue it that way. If Mr. Clark had wanted to retire any time, the firm could be Farrand & Williams.

"*Q.* How about the family name?

"*A.* We have a boy named Farrand Williams.

"*Q.* That boy was named long after that name was established?

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"*A.* Yes, sir.

"*Q.* How long had the name Farrand Williams been in existence before you became connected with the firm?

"*A.* Eight years.

"*Q.* That grew out of Jacob S. Farrand and W. C. Williams?

"*A.* Yes, sir."

After adopting this name, the defendants proceeded to advertise their business in an advertising medium called "The Industrial Advantages of Detroit," in which they inserted quite a lengthy article. In it they stated as follows:

"Though it may seem paradoxical, it is nevertheless true, that the wholesale drug-house of Farrand, Williams & Clark is both the oldest and newest representative of this important commercial industry in Detroit. Its proprietors are old and well known to the business. The location of the enterprise and its entire stock are entirely new."

The article then proceeds to give a short biography of Mr. Jacob S. Farrand, the head of the firm, and then states:

"On February 6 of the present year, the firm of Farrand, Williams & Co. having been dissolved, Messrs. Jacob S. Farrand, Harvey C. Clark, Richard P. Williams, and Jacob S. Farrand, Jr., withdrew from the house, and formed the new firm of Farrand, Williams & Clark, which, by the time this reaches the eye of the reader, will have been ready to supply their extensive and wide-spread trade with everything in the line of drugs, chemicals, medicines, paints and oils, druggists' sundries, etc., in the same prompt and enterprising manner as has always distinguished their operations during the past."

Then, after describing their new place of business, the article proceeds:

"The trade needs no introduction to the members of this firm, nor to the methods which have been so long in vogue with it. The junior members of the firm have

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long been the active managers of the business, and none are better qualified to conduct it; and the senior, though now past the allotted age of man, is still, 'Ixion-like,' the man at the wheel. Throughout the entire territory in which this firm's business radiates, the trade, in contemplating the important change made, may rest assured that the future of the new house will be fully in keeping with the record of its projectors."

They afterwards caused the same article to be published in the Michigan Tradesman, as "An Announcement to the Drug Trade." That journal is published in the interests of the drug and grocery trades, and has a large circulation. It is claimed that this article had no tendency to confuse the public, or to lead them to believe that the new firm of Farrand, Williams & Clark was a successor to the old firm of Farrand, Williams & Co.; and yet the bill for publishing this very article in the Michigan Tradesman was made out and sent to Farrand, Williams & Co., and came into the possession of the complainants.

The testimony is quite voluminous and very convincing that since the organization of the new firm of Farrand, Williams & Clark a great deal of confusion has been caused by the use of a name so similar to that of the old firm of Farrand, Williams & Co., and that the public has been greatly misled thereby. It was shown that one Halstead had been a customer of Farrand, Williams & Co. for many years. He dealt with Farrand, Williams & Clark after the formation of that firm, and there is no testimony showing that he supposed that this firm of Farrand, Williams & Clark was a successor of the firm of Farrand, Williams & Co. other than the fact that he remitted a draft payable to the order of Farrand, Williams & Co. The defendants received this draft, and indorsed it with the name of Farrand, Williams & Co. A great many other instances of mistakes made in ordering goods or in paying for them appear in the record.

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It was also in evidence that the old firm of Farrand, Williams & Co. used a peculiar envelope of a blue color during the entire time the firm existed. Upon this envelope was printed the usual request for return, if not delivered within a certain time, to Farrand, Williams & Co. Very soon after the new firm of Farrand, Williams & Clark organized, they, too, procured and had printed a blue envelope, with a like request for return, printed thereon, to Farrand, Williams & Clark. Mr. Richard P. Williams testified with reference to the selection of envelopes that Mr. Bogart, who was one of the persons who had formerly been in the employ of Farrand, Williams & Co., and Mr. Carver were given directions to get up the stationery, and they brought him a sample of envelopes that they got from somewhere in Detroit, and they had some talk about the color, and Mr. Bogart decided that the blue was the best, and asked his opinion. He replied that blue was good, and would not show dirt. "Bogart said, 'suppose we get some blue,' and I said, 'All right,' and they were gotten." He further testified that when he made the selection it did not occur to him that the firm of Farrand, Williams & Co. had been using an envelope of that color, and he further testified as follows: "But when I came to think of it, and when I heard the old firm objected to it, I saw right off we had made a mistake." The blue envelopes used by the firm of Farrand, Williams & Co. and Farrand, Williams & Clark were made exhibits, and their general appearance is such that the distinction would scarcely be recognized by any one unless his attention was specially called to the names. Mr. Bogart testified that it occurred to him at the time that blue was the color used by Farrand, Williams & Co.

Farrand, Williams & Co. also sold "Brooks' Genuine Dalmatian Insect Powder." The form of the tin box

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and style of yellow label were adopted by them. Farrand, Williams & Clark sold "Carver's Strictly Pure Insect Powder." Samples of each of these were produced, which show a striking similarity. They were identical in size, shape, and color of label, and contained similar arrangement of printing. Bogart selected the boxes and the labels.

Farrand, Williams & Co. had sold for many years "Marseilles Ochre." Farrand, Williams & Clark commenced to sell "Marseilles Ochre." Mr. Williams testified that "it is a name that we put on the brand that we used to sell at Farrand, Williams & Co.'s. We simply adopted it."

In reference to confusion of mail matter, instances without number are given in the testimony where letters addressed to Farrand, Williams & Co. have been delivered to Farrand, Williams & Clark; also where letters and packages have been addressed to Farrand, Williams & Co. at the place of business of the new firm, 32 and 34 Woodward avenue; also where letters have been addressed to Farrand, Williams & Clark, and been intended for Williams, Sheley & Brooks, successors to the old firm of Farrand, Williams & Co.; also where letters directed to Farrand, Williams & Co. were intended for Farrand, Williams & Clark. Mr. Hance, the postmaster at Detroit stated:

"I have had brought to my personal attention between ten and twenty letters addressed Farrand, Williams, and either Co. or Cl.; but the combination, if it was intended for Clark, looked so much like Co. that it might be taken for & Co. * * * Letters addressed to Farrand, Williams & Co., with the street and number of Farrand, Williams & Clark, would be delivered to Farrand, Williams & Clark; letters addressed to Farrand, Williams & Co., Detroit, Mich., would be delivered to Williams, Sheley & Brooks."

The case of a letter of Glidden & Gage, using an old,

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envelope of Farrand, Williams & Co., and simply striking out the old address and inserting the numbers 32 and 34 Woodward avenue, shows that the writer, although intending the letter for Williams, Sheley & Brooks, successors of the old firm, supposed that they had simply changed their address. Mr. Boyce, a druggist of Port Huron, testifies that, although intending to give his business to Farrand, Williams & Co., he was put into communication through the telephone with Farrand, Williams & Clark, and gave it to them, supposing he was giving it to the partners who were continuing the old business at the old place. Letters were received by the firm of Farrand, Williams & Co. at the store of Williams, Sheley & Brooks, directed to Farrand, Williams & Co., which were clearly intended for the firm of Farrand, Williams & Clark. It was also shown that there was a misdelivery of freight brought about by the similarity of names. Large scrap-books were introduced as exhibits in evidence, containing envelopes, letters, bills, statements, etc., in great number, addressed to Farrand, Williams & Co., which were received in due course of mail by complainants, and which were intended for defendants, Farrand, Williams & Clark. Some of these were directed to Farrand, Williams & Co., upon the letter or other matter contained in the envelope; others were addressed to Farrand, Williams & Co. upon the envelope, and Farrand, Williams & Clark inside, that did not relate to the business of the complainants. The testimony shows that well-known Detroit firms fell into error in attempting to distinguish the firms. George Campbell & Sons sent a letter and draft intended for complainants, which fell into the hands of the defendants, although addressed to Farrand, Williams & Co. Similar confusion exists with reference to goods. Goods intended for Williams, Sheley & Brooks, or Farrand, Williams & Co., were sometimes delivered to

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Farrand, Williams & Clark. G. & R. McMillan delivered to complainants wines which had never been ordered, and Berry Bros. turpentine, which was afterwards taken to defendants. The Detroit Free Press sent Farrand, Williams & Co., a large bundle of its issue of the day after defendants' answer was filed, and the bill was likewise sent to Farrand, Williams & Co. which was intended for defendants. James Vernor also delivered goods to complainants intended for defendants. A consignment to Farrand, Williams & Co. of glassware from McKee Bros., and of goods from Flora Jones, New York, were received by defendants. Fairbanks' scales came to Farrand, Williams & Co., which had never been ordered. Ten boxes of tissue paper were offered to defendants, though manifested to Farrand, Williams & Co. The same confusion existed of orders through the telephone.

Without citing further instances, with which the testimony atounds, I think the following propositions are conclusively proven:

First. The name "Farrand, Williams & Co." was a valuable asset of that firm, its value depending upon the firm's reputation, both as to its goods and credit, as formed by the long years of extensive business.

Second. The value of the name "Williams" to the combination of the words "Farrand" and "Williams" was given to the firm by the complainant W. C. Williams by his connection with Mr. Farrand in business, and the name "Farrand, Williams & Co." was to him a very valuable asset.

Third. The defendants, wishing to retire from the business, sold voluntarily to the remaining partners, the complainants, who saw fit to remain and continue the business, all their rights and interests in the going business. The interest of the retiring partners was an undivided interest in the joint property, a large part of

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which was so indelibly marked with the firm name as to make it valueless unless the vendees had the exclusive right to the use of that firm name. The sale by these retiring partners, therefore, necessarily comprised so much of the good-will as would attach to the goods sold.

Fourth. The right to the use of the name "Farrand, Williams & Co." belongs exclusively to the complainants by sale of the business to them; and the right to continue the going business as successors to the firm of Farrand, Williams & Co., and enjoy all the benefits attached to the same in any way, is exclusively the property of the complainants.

Fifth. The property sold, aside from the property in the right to the name "Farrand, Williams & Co.," was, at the highest market value put upon it by all parties, worth no more than $200,000. A large part of the property inventoried was worth far less than this sum. Its value depended largely upon the right of the purchasers to use the name "Farrand, Williams & Co.," by reason of the imprint of this name or the initials on a large part of the stock so inventoried. The defendants owned a one-half interest in this property, which by the inventory was valued at $100,000, and the payment of a bonus of $20,000 over and above this half-interest was clearly for the right to use the old name exclusively. There could have been no other consideration for this large sum of money.

That the defendants have adopted the name of Farrand, Williams & Clark is admitted, and they claim the right to do so upon the following proposition:

"Every man has the legal right to engage in any lawful business in his own name, or in connection with others, although by so doing he may interfere with the business of others previously established, and carried on under the same name."

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And they claim, further, that no man can be deprived of the absolute right to carry on any legal business in his own name, except by express contract, founded upon a sufficient consideration; that the only limit to this right is that he shall not represent his business to be the business of another, nor the goods which he offers for sale to be the goods of another; in other words, he must not "sail under false colors," or simulate the business of another. The exception stated to the proposition above is quite important in this case, for, in the first instance, the complainants claim that by the contract under which they purchased the business and property of the firm of Farrand, Williams & Co. there was, if not an express, an implied, inhibition against using a name so similar to that of the old firm as would deprive them of the benefits of the property purchased; and they claim further that by the representations made by the defendants to the public, through advertisements, and in simulating the trade-marks and envelopes and packages used by the old firm, they have simulated the business carried on by the complainants.

The defendants refer us, in support of the proposition which they have laid down, to the case of *Turton v. Turton*, 42 Ch. Div. 128. In this case the plaintiffs had for many years carried on the business of steel manufacturers under the name of Thomas Turton & Sons, down to 1886, when a company was organized under the name of Thomas Turton & Sons, Limited. Previous to the organization of the company they had adopted four trade-marks, which were transferred to the limited company with all the good-will belonging to the business of Thomas Turton & Sons. Their business had been very extensive. The defendant John Turton had for many years carried on a business similar to that of the plaintiffs in the same town, first as John Turton, and then John Turton &

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Co. In 1888 he took his two sons into partnership, and continued his business as John Turton & Sons. It was shown that the plaintiffs were generally referred to as Turton & Sons; that their letters and correspondence were often addressed to them as Turton & Sons, or Thomas Turton & Sons, without the word "Limited," and that checks intended for them were frequently made payable to the name of Turton & Sons; and it was claimed that the name adopted by the defendants had led to confusion between their firm and plaintiffs', and that persons who intended to give orders to the plaintiffs would be misled into sending their orders to the defendants. It was also shown that letters intended for the plaintiffs had in several instances been delivered to the defendants, who sent them to the plaintiffs. Other evidence of confusion of names was produced. The plaintiffs filed a bill asking for an injunction to restrain defendants from carrying on business as merchants and steel manufacturers under the name of John Turton & Sons, or under any style so closely resembling the plaintiffs' name as to be calculated to deceive. It was held in that case that the plaintiffs were not entitled to an injunction; that the defendants had a right to engage in business, and carry it on in their own names; and that they were not responsible for the blunders made by the business community in not distinguishing John Turton & Sons from Thomas Turton & Sons. It was stated by Lord Esher, M. R., in the course of his opinion, that—

"No man can have the right to represent his goods as the goods of another person. Therefore, if a man uses his own name, that is no *prima facie* case, but if, besides using his own name, he does other things which show that he is intending to represent, and is in the point of fact making his goods represent the goods of another person, then he is to be prohibited; but not otherwise."

This would be a strong case in favor of the defendants'

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position were it not that one important element is lacking to make it a parallel case to this. Thomas Turton & Sons had no connection in business with John Turton & Sons. They had never been partners. John Turton & Sons had never been in partnership with Thomas Turton. Neither he nor the members of his firm had sold their interest in the going firm to their partners. These facts distinguish this case from the one under consideration, and from those cases which hold that when partners sell a going business to another member of the firm, including the good-will, they are not at liberty to adopt a name, in continuing in business further, that is so near in resemblance to the sound of the old firm name as to deceive the public, and deprive the purchaser of the benefits to be derived from purchasing the business and carrying it on at the old stand. But this case is applicable in one respect, and that is, to that portion of the complaint which sets forth and insists that the defendants have imitated their labels, envelopes, and packages, and by their advertisements held themselves out in such manner as to deceive the public, and lead them to believe that they are the successors to Farrand, Williams & Co. In so far as they made their goods to represent the goods dealt in by complainants, and which they purchased from the firm, under the authority of Lord Esher they are to be prohibited.

In *Burgess v. Burgess*, 3 De Gex, M. & G. 896, the defendant had for many years been employed by the plaintiff, but he was not a partner. He had not sold the good-will of the business to the plaintiff, and it was held that he had a right to start in business at another place in his own name.

The case of *Meneely v. Meneely*, 62 N. Y. 427, is cited by the defendants. That was not a case where the defendants had sold their interest in the partnership to

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the plaintiffs, including their good-will; but it was a case where one of the defendants was of the same name as the plaintiffs, the defendants' firm name being Meneely & Kimberly, and they advertised their business under this firm name; the plaintiffs carrying on their business under the name of Andrew Meneely's Sons until 1863, and after that time in the name of E. A. & G. R. Meneely. In deciding the case, Rapallo, J., said:

"If the defendants were using the name of Meneely with the intention of holding themselves out as the successors of Andrew Meneely, and as the proprietors and managers of the old established foundry which was being conducted by the plaintiffs, and thus enticing away the plaintiffs' customers; and if, with that intention, they used the name in such a way as to make it appear to be that of the plaintiffs' firm, or resorted to any artifice to induce the belief that the establishment of the defendants was the same as that of the plaintiffs; and perhaps if, without any fraudulent intent, they had done acts calculated to mislead the public as to the identity of the establishments, and produce injury to the plaintiffs beyond that which resulted from the similarity of name,—then the cases referred to sustain the proposition; not that a court of equity would absolutely restrain the defendant Meneely from the use of his own name in any way or form, but simply that the court would enjoin him from using it in such a way as to deceive the public and injure the plaintiffs. The manner of using the name is all that would be enjoined, not the simple use of it; for every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead. Where the only confusion created is that which results from the similarity of names, the courts will not interfere."

The distinction between this case and the one under consideration is quite clear. Here there were not relations between the parties arising out of a partner-

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ship, and the selling by retiring partners to the other members of the firm the business of the firm. The principle contended for and decided in this case is not disputed by the complainants. To the same effect are *Cement Co. v. Le Page*, 147 Mass. 206, and *Manufacturing Co. v. Goodyear Rubber Co.*, 128 U. S. 598.

In *Rogers v. Taintor*, 97 Mass. 291, Taintor had become the purchaser of the good-will of an insolvent partnership doing business under the name of J. A. Fay & Co., at Worcester, Mass. He had been a member of the firm. After he so became the purchaser, he used the name of J. A. Fay & Co. in various ways. He attached the name to machines which he sold and sent to foreign countries. He circulated price-lists, with the name printed at the head of the first page, and the same name printed below, with the additional words, "E. C. Taintor, succeeding partner." In deciding the case, Mr. Justice Hoar said:

"We were inclined to the opinion that the sale of the good-will of the business of the Worcester firm of J. A. Fay & Co. to the defendant upon its dissolution in 1861, in which two of the complainants, who had been his partners, joined, would have the effect, as against them, to give him the right to continue to use the name, upon the facts which appear in the case; but, finding the considerations decisive which have been already stated, we do not think it necessary to enter upon that discussion."

We are also referred by the defendants' counsel to the case of *Gilman v. Hunnewell*, 122 Mass. 148. That was not a case where the retiring partners had made a sale of the good-will of the business, but was a case where the plaintiffs had purchased the good-will of the business of John L. Hunnewell, including certain trade-marks, labels, etc. The defendant Edwin Hunnewell had been in the employ of John L. Hunnewell for a long time, and after the sale to the plaintiffs entered into partnership with one John H. Dunbar, and commenced the

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same business under the style of Hunnewell & Co. There being no contract relations between the parties, the court held that there did not appear to them to be anything, either in the general appearance or in the contents, the form, the marks, or the arrangement of words of the defendants' labels, which would lead any one using reasonable care and observation to the belief that the defendants' remedy was manufactured by the plaintiffs, or that it was the same medicine as that sold by them; and denied the injunction.

It is insisted on behalf of the defendants that the fact that the parties were once copartners is in no wise material, but I think otherwise. I think the complainants' case rests entirely upon the fact that the parties were once copartners, and that the defendants sold to the other members of the firm the entire business, including a lease of the premises, and the good-will of the business; and that it was to continue as a going concern in the same line of business.

They also contend, which is not disputed, that upon the dissolution of a partnership each partner may re-engage in the same business, and compete with the others; that after dissolution, in the absence of an express agreement, neither can carry on business under the old firm name, unless the firm name be identical with the name of the partner. I do not think that it requires an express agreement to authorize the carrying on of a business under the old firm name. I think such agreement may be implied from the facts and circumstances, at least to the extent of carrying on the business as successors of the old firm.

They also contend that the retiring members of a firm may not only engage in the same business in the same locality, but they may advertise their business, and solicit the customers of the old firm, to the same extent that

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other business competitors may do; that they may personally solicit the customers of the old firm. There is no doubt that they may engage in the same business, and in the same locality, and that they may advertise their business; but where they have sold the good-will of the business to the other members of the firm they are precluded from personally soliciting the customers of the old firm.

Counsel for defendants cite the case of *Labouchere v. Dawson*, L. R. 13 Eq. 322. In that case one of the parties had sold his interest in the business, including—

"The good-will of the brewery business hitherto carried on at the premises in Kirkstall, herinbefore mentioned, and the exclusive right to use the name of Benjamin Dawson & Co. in connection with the business of brewers."

After this sale the vendor commenced to carry on the business of a brewer, at another place, and by travelers and agents solicited the customers of the firm of Benjamin Dawson & Co. The court held that the defendant was not at liberty to apply to any of the old customers privately by letter, personally, or by travelers, asking them to continue their custom to the defendant, and not to go to the vendees.

The case of *Pearson v. Pearson*, 27 Ch. Div. 145, is also cited in support of the defendants' contention, and it must be admitted that the majority of the court who gave their opinions in that case went probably to the full extent contended for by the defendants, but it was not an unanimous opinion. Justices Baggallay and Cotton concurred in overruling the case of *Labouchere v. Dawson*, but Lord Justice Lindley stated it to be his opinion that *Labouchere v. Dawson* was rightly decided, and I call attention to what he said upon page 158:

"Although the good-will is not in term mentioned in

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the agreement, I think that it is included; for a man who sells all his interest in a business cannot retain any interest in the good-will."

This remark states my view of the agreement in this case, and I wish further to quote from Lord Westbury in *Hall v. Barrows*, 33 Law J. Ch. 204, wherein he said:

"Inasmuch as the defendant, the surviving partner, has by his counsel submitted and agreed to accept and take all the stock belonging to the partnership according to the construction which the court shall put upon the word 'stock', * * * I declare that the words 'stock belonging to the partnership' include and denote the partnership business; * * * also that the exclusive right to use the trade-mark of the partnership is part of the property of the partnership, and ought to be included in the valuation; and that the good-will of the business of the partnership ought also to be valued, and that the same is to be valued on the footing of the surviving partner being at liberty to set up and carry on the same business as the partnership."

The case of *Levy v. Walker*, 10 Ch. Div. 436, supports the same view. There the firm of Charbonnel & Walker had been transacting business under that name, and upon the dissolution of the firm the retiring partner assigned her interest in the business to the other partner, Walker, who continued to carry it on in the same name of Charbonnel & Walker. The retiring partner filed a bill to enjoin the use of the name. Lord Chief Justice James said:

"But there is another point upon which I myself cannot entertain any doubt, which is this: That the assignment of the good-will and business of Charbonnel & Walker did convey the right to use the name of Charbonnel & Walker, and the exclusive right to use that name, as between the vendor and the purchaser of that business. Whether it would prevent another person from afterwards using the name of Charbonnel, I do not say; but the trade-name, made up of parts of two real names, as the master of the rolls says, the trade-name of Charbonnel & Walker (whether it was entirely a fictitious

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name can make no difference), was the name of the business, and that business was sold. That was a name with which every article sold might have been impressed; just as in the case of *Millington v. Fox,* 3 Mylne & C. 338, where the name was continued as part of the designation of the article sold. I think it right to say that the sale of the good-will and business conveys the right to the use of the partnership name as a description of the articles sold in that trade, and that that right is an exclusive right as against the person who sold it, and an exclusive right as against all the world, so that no other person could represent himself as carrying on the same business."

Lord Westbury, in the case of *Hall v. Barrows,* above referred to, says:

"But it must be borne in mind that a name, although originally the name of the first maker, may in time become a mere trade-mark or sign of quality, and cease to denote or to be current as indicating that any particular person is the maker. In many cases a name once affixed to a manufactured article continues to be used for generations after the death of the individual who first affixed it. In such cases the name is either accepted on the market as a brand of quality, or it becomes the denomination of the commodity itself, and is no longer a representation that the article is the manufacture of any particular person. * * * This distinction between a name and a trade-mark must be observed. It may be true that, if a name impressed upon a vendible commodity passes current in the market, not as an *indicium* of quality, but simply as a statement or assurance that the commodity has been manufactured by a particular person, the court would not sell and transfer to another person the right to use the name simply and without addition; but if the court sold the business or manufacture carried on by the owner of the name, it would give to the purchaser the right to represent himself as the successor in business of the first maker, and in that character to use the name."

In *Churton v. Douglas,* Johns. Eng. Ch. 174, the defendant, John Douglas, formerly a member of the firm

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of John Douglas & Co., had sold all his share in the good-will of the partnership to the plaintiffs, who were his former partners. He was restrained from using the firm name of John Douglas & Co., although his own name was John Douglas, and he was associated in partnership with others; and the vice-chancellor went on to say that, if the old firm name had been merely "John Douglas," and there had been a sale, by the individual of that name, of all his share in the good-will of the firm, "and he had secured the three managing men in the former business, and was going, as here, to set up the old firm of John Douglas with these three men, * * * * I should hold then, as I hold now, that he was not at liberty to trade under such a misrepresentation." And the vice-chancellor, in deciding that case, further said:

> "When you are parting with the good-will of a business, you mean to part with all that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it."

Upon the same principle as that announced in *Churton v. Douglas*, it was held in *Rodgers v. Nowill*, 3 De Gex, M. & G. 614, that defendants' firm, composed of John and William Nowill and William Rodgers, had no right to use upon articles of cutlery manufactured by them the name or mark "J. Rodgers & Sons," with the crown and the royal initials following it. This was a case where the defendants were restrained from using a firm name so near like that of the plaintiffs that it would be apt to mislead the public, although the defendants' firm name included the actual name of one of the members of the firm.

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In the case of *Burckhardt v. Burckhardt*,[1] 36 Ohio St. 261, by the agreement the property, including the good-will, was required to be put up, bid off, and sold as a "going concern" to the highest bidder of the partners. The defendant became the purchaser, and plaintiff gave the defendant the exclusive possession of the concern, and conveyed and transferred to him the property purchased. The consideration was entire for all that was purchased, and there was no separation, in the contemplation of the parties, of the good-will from the other property. The court held that the good-will of the concern passed to the purchaser, and that he was entitled to his damages for the injuries sustained by him in being deprived thereof. The old firm had been conducting business under the firm name of Burckhardt & Co. The agreement reserved the right for the plaintiff to engage in business in his own name, but he agreed that he would not engage in business under the firm name. He assumed the name of Leopold Burckhardt & Co., and advertised his business in such a manner as to lead the customers of the old firm to believe that he was carrying on the business, and he solicited their customers by letters, circulars, and agents or traveling salesmen. He also hired the salesmen who had been employed by the old firm to sell his goods, and he engaged in the same kind of business that the old firm had been engaged in. The court held that he was liable for the actual damages which he had caused to the extent to which he had obtained the old customers of the firm to cease trading with it, and to trade with him; in other words, to the extent to which he had obtained a transfer of their patronage.

[1] This case was a foreclosure suit, in which the defendant filed a counter-claim for being deprived of the good-will of the old business.

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It has been held that the good-will of a business is the subject of sale, like other personal property. *Churton v. Douglas,* Johns. Eng. Ch. 174; *Banks v. Gibson,* 11 Jur. (N. S.) 680; *Hitchcock v. Coker,* 6 Adol. & E. 438; *Wedderburn v. Wedderburn,* 22 Beav. 84; *Johnson v. Helleley,* 34 Id. 63; *Bradbury v. Dickens,* 27 Id. 53; *Mellersh v. Keen,* 28 Id. 453; *Turner v. Major,* 3 Giff. 442; *Cruttwell v. Lye,* 17 Ves. 335; *Shackle v. Baker,* 14 Id. 468; *Hall v. Barrows,* 33 Law J. Ch. 204; *McFarland v. Stewart,* 2 Watts, 111; *Holden's Adm'rs v. McMakin,* 1 Pars. Eq. Cas. 270; *Musselman's Appeal,* 62 Penn. St. 81; *Williams v. Wilson,* 4 Sandf. Ch. 379; *Dougherty v. VanNostrand,* 1 Hoff. Ch. 68. It may be bequeathed by will. *Hitchcock v. Coker,* 6 Adol. & E. 438; *Smith v. Everett,* 27 Beav. 446. It will pass under a creditor's deed, by which the separate estate of the partners, as well as the firm's assets, is conveyed to trustees. *Bury v. Bedford,* 4 De Gex, J. &. S. 352. It is an asset of the copartnership. *Macdonald v. Richardson,* 1 Giff. 81; *Banks v. Gibson,* 11 Jur. (N. S.) 680; *Austen v. Boys,* 2 De Gex, & J. 626; *Willett v. Blanford,* 1 Hare, 271; *Musselman's Appeal,* 62 Penn. St. 81; *Crawshay v. Collins,* 15 Ves. 218; *Mellersh v. Keen,* 27 Beav. 236, and 28 Id. 453. These authorities establish the proposition that the good-will, as well as the trade-marks and trade-name, is property which is entitled to the protection of a court of equity.

Other authorities sustaining the contention of the complainants are found in the following cases: *Myers v. Buggy Co.,* 54 Mich. 215; *Grow v. Seligman,* 47 Id. 607; *Mogford v. Courtenay,* 45 Law T. (N. S.) 303; Kerr, Inj. 167 *et seq.*; High, Inj. § 822; Bates, Partn. §§ 570, 663, 669, 672; *Gage v. Publishing Co.,* 11 Ont. App. 402; *Merry v. Hoopes,* 111 N. Y. 415; *Hoxie v. Chaney,* 143 Mass. 592; *Shipwright v. Clements,* 19 Wkly. Rep. 599;

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Holmes v. Manufacturing Co., 37 Conn. 278; *Cement Co. v. Le Page*, 147 Mass. 206; Lindley, Partn. 439; *Hall's Appeal*, 60 Penn. St. 462; Colly. Partn. §§ 162, 168; *Shaver v. Shaver*, 54 Iowa, 208 (6 N. W. Rep. 188); *Liggett & Myers Tobacco Co. v. Sam Reid Tobacco Co.*, 104 Mo. 53 (15 S. W. Rep. 843). The complainants' case may be safely rested upon the principles recognized and acted upon in *Myers v. Buggy Co.*, above cited.

The record in this case is voluminous, and this opinion has already been drawn out to greater length than I intended; but whoever will take the trouble to read the proofs will find that a plain case for equitable relief is made out under well-recognized principles of equitable jurisdiction.

The complainants are entitled substantially to the relief prayed for, and the decree of the court below should be reversed, and a decree entered here in accordance with the prayer of the bill.

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FANNIE E. COLLER v. ALBERT PORTER AND CHARLES A. COLLER.

Partnership—Authority to borrow—Evidence.

1. A general agreement by one partner on the dissolution of the firm to assume and pay all of the firm debts, without further specification, is not admissible in evidence on the part of the plaintiff in a suit subsequently brought against the firm to recover for money borrowed by the other partner for the use, as claimed, of the firm, which is denied by the partner making said agreement, who, as conclusively shown by the evidence, never recognized plaintiff's claim as a firm debt.
2. In a suit against a firm to recover for money loaned to one of

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the partners, the other partner defended on the theory that the loan was for the individual use of the partner making it, with the knowledge of the plaintiff, while the plaintiff contended, and the testimony on her behalf tended to show, that it was necessary to use the money in the firm business, and that it was borrowed for that purpose. And it is held that the plaintiff was properly asked on her direct examination if she knew of any attempt on the part of the partner who made the loan to defraud his copartner, and, if he had taken advantage of him in any way, whether she had been a party to such action in any way, or had knowledge of it.

3. It appeared on the trial that the partner who made the loan was using the firm money for his individual use without charging it on the books; that he was also a borrower; that, although the manager of the business, he kept the firm books in such a condition as to prevent his copartner from knowing what he was doing; and that, if not actually engaged in defrauding him, he was grossly negligent, and acted in bad faith towards him in the conduct of the business. And it is held that said copartner was entitled to a searching cross-examination of his copartner when sworn in behalf of the plaintiff, and to inquire fully into his financial condition and transactions from the commencement of the business, and his intentions towards him, and to inquire if he did not know at the time he went into said business that he had no money with which to enter the same.

4. In the absence of an agreement to the contrary, either member of a firm engaged in the wholesale and retail grocery business has the right to borrow money for the purposes of the business.

5. Third parties have a right to rely upon such implied authority, and if they loan money in good faith to one partner, without knowledge or notice of such facts as would lead an ordinarily prudent person to suspect that the loan is made for the individual use of the partner making it, they can recover against the firm.

Error to Eaton. (Hooker, J.) Argued June 4, 1891. Decided December 21, 1891.

Assumpsit. Defendant Porter brings error. Reversed. The facts are stated in the opinion.

John M. Corbin, for appellant, contended:

1. Requests which clearly state the law, and which are applicable

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to the case at bar, should be given to the jury, and it is error to refuse them, even though the court in his general charge gives their substance in another form; citing *Lumber Co. v. Lumber Co.*, 79 Mich. 307; *People v. Jacks*, 76 Id. 218.

2. Borrowing money on the credit of the firm is not necessarily within the scope of a partnership formed for the purpose of carrying on a retail business; citing Lindley, Part. 126; *Ricketts v. Bennett*, 4 C. B. 686; Story, Part. § 113; T. Parsons, Part. 103.

H. F. & F. A. Pennington, for plaintiff, contended:

1. Defendant Coller was the managing partner, and had full control of the business, purchased the goods, employed salesmen, made collections, and borrowed money, and under the circumstances had full power and authority to borrow the money of plaintiff, and bind the firm therefor; citing *Osborn v. Osborn*, 36 Mich. 48.

MORSE, J. This is an action of *assumpsit* for moneys claimed to have been loaned at different times to the firm of C. A. Coller & Co., composed of the defendants. The items as set forth in the bill of particulars are as follows:

1887.			
Aug. 27.	To cash loaned defendants		$108 00
Oct. 1.	To cash " "		30 00
Oct. 29.	To cash " "		15 00
Nov. 28.	To cash " "		10 00
1888.			
Jan. 5.	To cash " "		15 50
Feb. 25.	To cash " "		30 00
Mar. 26.	To cash " "		22 50
Apr. 24.	To cash " "		20 00
May 26.	To cash " "		13 00
Total			$264 00

Plaintiff is a sister of Charles A. Coller, one of the defendants. Defendants formed a copartnership for the purpose of carrying on a retail grocery and provision store in the city of Eaton Rapids, and they commenced business on 27th of June, 1887, and ended on the 2d of September, 1888. Each partner was to put in $800, and they purchased the stock of one I. N. Reynolds. After

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paying him $1,600, there was left an amount of $903.82 due him on the purchase price of the stock. It was settled up by giving the firm notes. The business was conducted by Charles A. Coller, Porter having nothing to do with the management thereof, trusting the business to Coller. Defendant Coller, who was book-keeper, kept no books that showed the entire business, and a portion of the time kept no cash-book, and had no way of telling the state of the business. His sister, the plaintiff, helped him post up the books Saturday evenings, and sometimes helped him about the store day-times, making entries in the books. The copartnership books contained no reference to the loaning of this money in any way. July 18, 1888, Coller took an inventory of the stock, and made a statement to Porter, which showed the stock and book accounts to be $4,955.91; indebtedness, $3,077.81; which left a balance of $1,878.10. In this statement there appeared no item of the alleged debt to his sister, or to Dr. Walter, a brother-in-law of Coller. The first defendant Porter learned anything of any debt claimed against the firm by plaintiff or Dr. Walter was when the defendant Coller gave a chattel mortgage on the stock to each one of them. On the 29th day of September, 1888, another inventory was taken, which showed the total assets to be $3,562.09, and the debts $3,568. Porter, on the 28th of September, 1888, bought out the interest of Coller in full. An agreement was entered into between them as follows:

"This agreement, made and entered into this 28th day of September, A. D. 1888, between Albert Porter, of the first part, and Charles A. Coller, of the other part, comprising the firm of C. A. Coller & Co., of the city of Eaton Rapids, witnesseth:

"*First.* That the firm of C. A. Coller & Co. is hereby dissolved by mutual consent; that the entire assets of said firm, including all book-accounts, notes, goods, wares, and

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merchandise, or personal property of any kind belonging to the said firm of C. A. Coller & Co., are hereby sold, assigned, and transferred to Albert Porter.

"*Second.* That the said C. A. Coller is to procure the release of the chattel mortgage given by C. A. Coller & Co. to Hiram Walter, and a receipt in full from said Hiram Walter to any claim or demand that he may have or claim to have against the said firm of C. A. Coller & Co.

"*Third.* In consideration therefor the said Albert Porter is to assume and pay each, all, and every one of the firm debts now due and owing by said firm of C. A. Coller & Co., and save the said C. A. Coller harmless from any costs, trouble, or expense by reason of his liability as a partner to pay such firm indebtedness.

"*Fourth.* Said C. A. Coller hereby relinquishes any claim or demand which he may have against the said firm of C. A. Coller & Co.

"In witness whereof the parties hereto have hereunto set their hand and seal to this duplicate agreement the day and year first above mentioned.

"ALBERT PORTER. [L. S.]
"C. A. COLLER. [L. S.]"

Plaintiff had judgment in the court below for the full amount of her claim.

The admission of this agreement is alleged as error. It was admitted in evidence against the objection of defendant. The court told the jury that it could not be used to show a ratification of plaintiff's claim by Porter; that the contract was only to pay the legal debts of the concern, and that, if this was a debt legally due from the firm, then Porter was liable for it; if not, the contract did not increase his liability. There was some testimony tending to show that, before or at the time the contract was made, the claim of plaintiff was among the list of the firm debts which was presented to Porter; and the claim was no doubt made in the court below, as it is in this Court, that the fact that Porter provided in this contract that he would not pay the claim of Walter, and that Coller should procure the release of his mortgage,

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and a receipt in full for such claim, and made no such provision in relation to the claim and chattel mortgage of plaintiff, was a circumstance showing that he recognized plaintiff's claim to be a valid one at that time. The evidence, however, is conclusive that he never recognized the debt, and we think that the introduction of this contract in evidence was irrelevant, and that it may have influenced the jury against the defendant Porter.

The following questions were asked of the plaintiff while she was on the stand:

"Now, you probably heard Mr. Corbin's remark, a while ago, upon the question as to your matters. Do you know of any attempt upon the part of your brother, in borrowing these sums from you, to defraud or wrong Mr. Porter?"

"If your brother has taken advantage of Mr. Porter in any way, have you been a party to it in any way, or known of it?"

"The theory of the defense is that you loaned this money, if at all, to your brother upon his individual responsibility, and upon his individual credit, and since the settlement you have allowed. Do you know of any such combination as that?"

These questions, under objection, were all answered in the negative. We think the questions were proper. The theory of the defense was that this money was borrowed by Charles A. Coller for his own individual use and benefit, with the knowledge of the plaintiff. The theory of the plaintiff was, and the testimony in her behalf tended to show, that it was necessary to use this money in the firm's business, and that it was borrowed for that purpose.

I. N. Reynolds, of whom the firm purchased the store business, was sworn as a witness for the defendants, and, being inquired of as to the amount of business that was done, was asked,—

"What were the indications so far as you were able to

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judge, compared with the business you had been doing just previous to that time?"

The question was excluded. There was no error in so doing.

The defendant Coller was asked, on cross-examination, if he did not know at the time he went into business that he had no money with which to go into business. One of the theories of the defense was that Coller had no money to go into business; that a portion of this money, if not all of it, borrowed of his sister, was used in paying money that he borrowed to go into business. Under the circumstances of the case, we think that the defendant Porter should have been allowed a very liberal cross-examination of this witness, and the question should have been permitted. It appears very plainly from the record that Coller was taking money out of the firm for his own individual use, and making no charge of it on the books; that he also was himself a borrower; that his books were in such a condition that his partner could not tell what he was doing; and the showing of the two inventories was such that it must be considered that Coller, if not actually engaged in defrauding the defendant Porter, was grossly negligent, and acted in bad faith towards him in the business. Considering the fact that Porter was not acquainted by either the plaintiff or the defendant Coller with the borrowing of this money by Coller until about the time of the dissolution of the firm; that no charge or memorandum was made by the defendant Coller on the firm books tending to show that it was loaned for the benefit of the firm; and under the circumstances of the conduct of Coller, and the further fact that neither Coller nor the plaintiff could tell for what special purpose any of this money was used for the benefit of the firm, and there being no entry made any-

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where of its use,—we think the defendant Porter was entitled to most searching inquiries into the financial condition and transactions of Coller from the first, and his intentions towards Porter.

The defendant's counsel requested the court to charge the jury, among other things, as follows:

"1. That, it appearing from the bill of particulars filed in this cause that the plaintiff's claim consists solely of items of cash lent to the defendants (who comprised the firm of C. A. Coller & Co.), the burden of proof is upon the plaintiff to show that both of the partners either consented to or ratified the making of these several loans, unless it appears that the making of such loans was clearly within the scope of said partnership business.

"2. It appearing from the evidence in the case that the defendants, C. A. Coller & Co., were engaged solely in the retail grocery business at the city of Eaton Rapids, neither partner, in the absence of an express agreement to that effect, or authority from the other partner, would have power to bind the copartnership by a loan of money, unless the expenses of the business demanded it.

"3. If you find from the evidence in this case that, by the terms of the copartnership agreement, as is claimed by the defendant Porter, no money was to be borrowed without the consent of both partners, then, and in that case, the burden of proof is upon the plaintiff to show that defendant Porter knew of or consented to the various loans claimed to have been made to defendants by plaintiff, or that he afterwards ratified them."

"7. The court instructs the jury that borrowing money on the credit of the firm is not necessarily within the scope of the partnership business, when the partnership is formed for the purpose of carrying on a retail grocery business."

Defendant's counsel argues that borrowing money on the credit of the firm is not necessarily within the scope of a partnership business, when the partnership is formed for the purpose of carrying on the retail grocery business,

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and that these requests should have been given in the language of them. The court charged the jury, in relation to the third request, that, if there was an agreement between Coller and Porter that no money should be borrowed except by the consent of both, then Coller had no right to borrow this money. This was more favorable than the defendant asked in such request. The jury were also instructed, and we think correctly, that when partners were engaged in such a grocery business as this was, where they were doing a wholesale and retail business, they had the right to borrow money for the necessary purposes of the business; but, if it was not borrowed for the necessary purposes of the firm, the plaintiff could not recover, if she knew it was not borrowed for such purposes; but she had a right to rely upon the implied power of Coller to borrow money, and if she loaned the money in good faith, and did so without knowledge or notice of such facts as would lead an ordinarily prudent person to suspect that the loan was for her brother, she had the right to recover. We think the entire charge of the court was very fair to the defendant Porter, and stated the law clearly.

For the errors above mentioned judgment must be reversed, and a new trial granted, with costs of this Court to defendant Porter.

The other Justices concurred.

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ISAAC B. MATHEWSON AND JOHN KLOOTE v. THE CITY OF GRAND RAPIDS.

Municipal corporations—Grading contract—Delay in performance —Liability of city—Ultra vires—Pleading.

1. Where, in a suit by contractors against a city to recover damages for being delayed in the performance of the contract, the declaration sets forth the contract in full, but not the specifications, which are referred to in the contract, and made a part thereof, it is proper pleading for the defendant to attach to its demurrer a copy of the specifications, and thus exhibit the entire contract to the court.
2. A contractor cannot recover damages of a city for being delayed in the performance of a contract for grading a street in such a manner as necessarily to cause the embankment to rest partially upon the lands of abutting owners, one of whom enjoins the performance of the contract, thereby causing the delay complained of, it appearing that both parties acted in good faith, and under the misapprehension that the city had a right so to use the abutting property as a natural and necessary incident to the improvement of the street, and without compensation to or the consent of the abutting owners; such compensation being afterwards made, and the contract performed, and the contractor paid the contract price in full.
3. A request by the board of public works of the city that the contractors desist from work in front of the land of other abutting owners in like manner affected pending such litigation is unimportant, as a compliance therewith would not make the city liable for the resulting damages.

Error to superior court of Grand Rapids. (Burlingame, J.) Argued May 14, 1891. Decided December 21, 1891.

Assumpsit. Plaintiffs bring error. Affirmed. The facts are state in the opinion.

Taggart, Wolcott & Ganson, for appellants.

William Wisner Taylor, for defendant.

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MORSE, J. This case comes here on declaration and demurrer. The demurrer was sustained in the court below.

The substance of the declaration, as stated in plaintiffs' brief, and mainly correct, is as follows:

On the 14th day of May, 1888, plaintiffs entered into a contract with the city of Grand Rapids to improve North College avenue, which was executed in a proper manner by both parties. The improvement consisted of the grade and fill of such street from East Bridge street north to the city limits; the plaintiffs being required to furnish all material and incidental work, and according to plan, specifications, and profile on file with the board of public works. The plaintiffs, by the terms of the contract, were to commence on the 21st day of May, 1888, and complete the work on or before August 15, 1889. By the third paragraph of the contract, the time named for the completion of the work is made material, "and of the very essence of this contract; and for each and every day the contract shall remain unperformed, after the time named for the performance thereof, the said board of public works may, in its discretion, deduct the sum of ten dollars from the amount to be paid by said second party on this contract." The street was to be graded, as it is alleged in the declaration, 66 feet wide, and a fill was necessary at certain points of 26 feet above the surface of the adjacent premises.

It is alleged by the plaintiffs that in the making of said contract the defendant undertook and agreed that the preliminary steps necessary to be taken on its part to secure the right to make such an improvement, and in the manner called for by the contract, had been taken, and that it had the right to so contract and so improve said street. And the plaintiffs further allege that they believed that the city was acting with full authority, and had such right, and that such contract gave them full power to execute the same in every particular as they were required to do by its terms. Plaintiffs allege that they did go on and employ a large number of men, and secured the necessary material, and commenced work thereon, and were in condition to complete the work in every respect, in accordance with the conditions and terms of said contract.

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Plaintiffs further allege that at the time of the making of said contract, and for about a year thereafter, defendant had not secured the right from any of the property-owners adjacent to North College avenue, including one Sophie Vanderlip's property, at the point where the same was by the terms of the contract to be filled, to fill the same as the contract required; that making the fill, as required by the contract, necessitated an encroachment upon Sophie Vanderlip, and other adjacent property-owners; that the slope of such fill, as required by the contract and specifications, reached over upon the land of such parties; that Sophie Vanderlip obtained an injunction against the prosecution of the work in front of her premises from the superior court of Grand Rapids, and other property-owners, holding in the same manner as Sophie Vanderlip, asserted their rights against the execution of said contract by plaintiffs in front of their premises; that the injunction obtained by Sophie Vanderlip was affirmed in the Supreme Court, and by reason thereof, and of the claims of other parties from whom said defendant had obtained no right to have said contract carried into execution, plaintiffs were delayed in the performance and execution of the contract for the period of about one year.

The declaration alleges that after such rights were obtained, as they were, by the city from these several parties, they completed the work in question, but never waived any of their rights to claim damages by reason of this breach of the contract, as aforesaid, and they so notified said city and its various officials, and, in the receipt of the amount paid them by said city, refused to receive the sum in full of extra work and damages occasioned by such breach of contract, and so notified the said city. Plaintiffs allege a presentment of their claim to the city, and that it was entirely rejected. The declaration also alleges that the board of public works and its officials desired them not to continue work on said improvement in front of the premises owned by persons from whom the city had obtained no right to have said contract carried into execution. The declaration also alleges the knowledge on the part of the defendant that it had no right or authority to cause said College avenue to be filled, as the said contract required plaintiffs to fill the same. Various items of damage are set out in the declaration. Plaintiffs admit that the city has

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paid them in orders or money the amount of the contract price.

The declaration set forth the contract in full, in which contract the plan, specifications, and profile of the work were referred to and made a part of the contract, but the declaration did not give the plan, specifications, and profile in full. The defendant in its demurrer attached the specifications in full of the work. This was proper pleading. They were a part of the contract, and necessarily a part of the declaration, and, not being therein given in full, it was proper for the defendant thus to exhibit them to the court, so that the whole contract might be before it. The demurrer insisted—

1. That, as a matter of law, under the terms of said contract, the defendant did not undertake and agree that the preliminary steps necessary to be taken by the defendant had been taken on its part, and that said defendant had the right, and had secured the right from the property-owners adjoining and adjacent to the street, to improve said street; and that the defendant did not, by such contract, obligate itself to see that said plaintiffs were not hindered, delayed, or interfered with in carrying out such contract.

2. That the board of public works had no power to make any request that the plaintiffs should not go on with their work, or to prevent them from continuing it, and that the delay was not caused by defendant, or any of its agents, as appears from the declaration, but by the act of the person enjoining the city and plaintiffs from the prosecution of said work; that, if any request was made by such board, such action was *ultra vires* and void, and not binding upon defendant, and no right of action could grow out of plaintiffs' stopping work at the request of such board.

3. That for these reasons the declaration, as a matter of law, does not disclose a right of action against the city.

It is not claimed that the contract, by its express terms, guarantees that the city has the right to make

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this improvement, or has secured such right from the property-owners along the line, but it is contended that, by entering into this contract, there is an implied agreement upon the part of the city that it has prepared or will prepare the way for the performance, and it is to be presumed that the very thing essential for that purpose constituted an element of the agreement. It is apparent from the contract, the pleadings in this case, and the facts in the case of *Vanderlip v. City of Grand Rapids*, 73 Mich. 522, that the city authorities, at the time they entered into this contract, supposed that they had the right to improve the street as contemplated by such contract. All the necessary steps to grade and improve the streets, so far as the city supposed it was concerned, had been taken. The litigation in the Vanderlip case did not grow out of any want of jurisdiction in the city to grade and improve the street proper, but in raising the grade of the street at certain places, one of which was in front of Mrs. Vanderlip's home. The city supposed that it had the right, without the consent of the owners of the abutting property, as an incident of said grade, to let the earth of the fill slide over and upon the abutting lots, if the width of the street proper at the top of the grade was not increased thereby beyond the lines of the highway; that such filling in was not taking of private property for public use; and that the city was not required to take proceedings to condemn the land so occupied by the sliding of the fill. Mrs. Vanderlip enjoined the city and these plaintiffs from grading the street so that part of the embankment at the bottom would encroach upon her land, and we held that she had the right so to enjoin them. The delay in the performance of the work came from this injunction, and the litigation connected with it. The work was not

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stopped by the voluntary action or direction of the city. It was not delayed by the actual fault of the city on account of its neglect or failure to furnish any material, or to do any other thing within its power to do, and known to be its duty to perform. It simply failed in its knowledge of the law as to its power to rest the base of the embankment upon the adjoining lands, without the consent of the owners and without compensation to them. In such a case, if the work had been permanently stopped by the injunction, there is no doubt but the plaintiffs could have recovered the value of the work performed. In this case they finally completed their contract, and were paid the contract price in full. What they are now seeking is damage for the delay caused by the injunction. I do not think the city is liable for such damages, and the demurrer was properly sustained.

The fact that the board of public works requested them to desist from the work, pending the Vanderlip litigation, in front of the premises of owners situated in the same manner as those of Mrs. Vanderlip, cuts no figure in this case. A compliance with such request could not make the city liable for the damages resulting from such compliance.

The cases cited by plaintiffs' counsel do not reach the case before us. I have carefully examined these cases, and find but few of them to have any connection with the point here in controversy.[1]

In *Doolittle v. Nash*, 48 Vt. 441, the railroad company was enjoined from constructing its road upon certain lands,

[1]Counsel cited, in addition to the cases referred to in the opinion, the following authorities: 2 Suth. Dam. 521, 522; Dill. Mun. Corp. § 449 (373); *Whitfield v. Zellnor*, 24 Miss. 663; *Allamon v. Mayor*, 43 Barb. 35; *County of Christian v. Overholt*, 18 Ill. 223; *Railroad Co. v. Van Dusen*, 29 Mich. 431; *U. S. v. Behan*, 110 U. S. 338; *Steel Rail Co. v. Hinckley*, 17 Fed. Rept. 584; *Sullivan v. Commissioners*, 114 Ill. 262; *Jones v. Judd*, 4 N. Y. 412; *Clark v. Mayor*, Id. 338; *Smith v. Buffalo*, 44 Hun, 156; *Masterton v. Mayor*, 7 Hill, 61; *Blanchard v. Blackstone*, 102 Mass. 343.

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because it had not acquired the right to do so; whereby the performance of the contract by plaintiff in that case was prevented. Plaintiff was a subcontractor under defendant. The court held that the injunction was without the fault of either of the parties, but said that the defendant was impliedly under the same obligation to see that the plaintiff had the opportunity to perform his contract that the plaintiff was to perform it.

"It was the business of the defendant to know before he made the contract, and thereby induce the plaintiff to incur the expense of preparation, that he had the right to have the contract performed. If he had not that right, then he was in fault in making the contract, and should be liable to the plaintiff for the damages, and it is no answer to say that he supposed he had the right and acted in good faith."

It was intimated that, if the injunction was unlawfully obtained, the defendant had his remedy upon the injunction bond; if rightfully obtained, then the defendant would have his remedy against the railroad company, it being the party in fault. This decision seems to be based upon the idea that, if the plaintiff had no right of action against defendant, he was without remedy, and must bear the loss, which would be unjust; and that the party in fault would be liable to the defendant for what he was obliged to make good to plaintiff, and in the end the loss would be borne, as it ought to be, by the party in fault. The railroad company was presumed to know whether it had acquired the right to pass over the lands, and for that reason would be liable for the damages resulting from its failure to obtain such right. It will be seen that no municipal corporation or its agents were involved in the suit, and the rights and remedies discussed were those of private persons or corporations.

In *Bill v. City of Denver*, 29 Fed. Rep. 344, the plaintiff was employed by the city as an inspector of

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sewers. The city passed an ordinance creating a sewer district, reciting that it was in accordance with the petition of a majority of the property-owners,—a condition required by the law. After considerable work had been done, it was ascertained that a majority of the property-owners had not petitioned, and the city abandoned the work. The court held that the city was liable for the work done by the plaintiff on this sewer, on the ground that there was no other body or tribunal to pass upon the fact whether a majority of the property-owners had petitioned for the improvement; so that the action of the council in the first place, reciting that a majority had so petitioned, was conclusive upon the city as against the plaintiff, and he had a right to rely upon the fact that the city had power to proceed and make a levy to pay for the work.

In *Moore v. Mayor*, 73 N. Y. 238, the action was brought for a balance upon a contract fully performed by the plaintiff for the paving of certain streets in the city of New York. The payment was resisted on the ground that the resolution authorizing the paving was not published in the Leader according to law. It was held that the city must pay; that the act of paving these streets was within the general power of the municipality; that there was no apparent defect in the proceedings upon the journals of the common council; and that the irregularity claimed—and it was only an irregularity—was the omission of an act *in pais* outside of the council chamber, and of which no record would appear in the journals of the council. It was held, under these circumstances, that an individual, dealing with the agents of the city government, should be permitted to regard the acts of the government as valid, in the absence of any apparent defect, either in the power or the manner of its exercise.

These are the only cases cited that have any close bear-

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ing upon the question at issue here, and, as it will be seen, they fail to touch it. The specifications in the contract before us provided that the street should be graded 66 feet wide, the whole width of the street, and that when the embankments were made they were to be "made with side slopes of one and one-half feet horizontal to one foot vertical." It was as plain to the plaintiffs as to the city officers that when the embankments were made, if the street was graded its full width, the embankments must rest more or less upon the lands of abutting owners. To so use these lands without compensation, and without the consent of the owners, was not within the general powers of the municipality, and the plaintiffs, in such case, were bound to know the limit of such power. *Moore v. Mayor*, 73 N. Y. 245; *Newman v. Sylvester*, 42 Ind. 106. And when the city acted in good faith in letting this contract under the misapprehension that it had a right so to use the abutting property, as a natural and necessary incident to the improvement of the street, without compensation to the owners, and without their consent, and when the plaintiffs also supposed they had such right, they having the like knowledge of the law, which all are supposed alike to know as the common council, the city cannot be held liable to plaintiffs for damages claimed for interruption of the work by the injunction of Mrs. Vanderlip. It was for plaintiffs, as well as the common council, to make inquiry as to the right of the city to place or rest a portion of the foundation of its embankment upon the abutting premises. It was their duty to know whether the city had the right, and common prudence required them to ascertain the authority of the city before they undertook the work. See *Newman v. Sylvester*, 42 Ind. 111-113, and cases there cited.

In *Davies v. City of East Saginaw*, 66 Mich. 37, 40, in

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a grading contract exactly like this in respect of its grades to the full width of 66 feet, we held that the contractor could not recover for the work actually done in filling outside of the street line, for the reason that neither the city nor the contractor had the right to put any dirt upon the abutting lands. In this case the plaintiffs received pay for all the work they did at the contract price, and cannot recover for damages occasioned by the stoppage of the work by injunction because of the unlawful act of the city, in which they joined.

There is no claim in the declaration that the city knowingly misled the plaintiffs.

The demurrer was properly sustained, and the judgment of the lower court is affirmed.

The other Justices concurred.

BROWSE T. PRENTIS AND RACHEL L. DOTY v. GEORGE W. BATES ET AL.

Will—Mental incompetency—Conduct of counsel—Opening to jury—Insanity—Evidence—Hypothetical questions—Expert testimony.

1. The burden of proof is upon the contestants of a will to establish undue influence and incompetency to make it, and it is incumbent upon them to produce positive proof in support of either one or both of these propositions to entitle them to a verdict.
2. Counsel, in their opening to the jury, should be limited to a brief and concise statement of the facts which they propose to prove, of which it is their duty to inform themselves, and to satisfy themselves of their *right* to prove them; and such opening is not the place for argument.[1]

[1] See *Zucker v. Karpeles*, 88 Mich. 413, and cases cited in footnote.

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3. Especially is it the duty of courts to exclude from the jury the unjustifiable statements of counsel, as well as immaterial and incompetent evidence, which might prejudice them, in a case involving the validity of a will, when the soundness of the testator's mind was not questioned during his life-time by any of his relatives, and he was left in the entire control and management of his large property until his death.

4. A will was contested on the grounds of undue influence and mental incompetency. After the case had been argued to the jury for six days, the court withdrew the former question from their consideration. On appeal by the proponents, they objected to the action of the court, on the ground that the ruling should have been made at the close of contestants' testimony, it being fair to presume that the jury were prejudiced by the arguments of contestants' counsel upon the question of undue influence. And it is held that it is important to eliminate such questions from the consideration of the jury as soon as possible, and that it is the better practice to have them discussed in the absence of the jury, if claimed to be questions of law and not of fact; but that it is quite possible, even where the question is first argued before the court alone, that the judge may not become convinced of his duty in the matter until after the arguments to the jury, and in such a case it will not be presumed that they did not follow the instructions of the court, and leave the question out of their consideration.

5. Testimony that a testatrix talked more than some others; that she seemed erratic; that she talked upon various subjects; that she changed her mind as to the cost of a house which she was building; that she wanted different arrangements made from what the architect thought proper or consistent with good building; that she once got angry and screamed; that she scolded the men who were at work, changed her mind about colors, and became enraged and angry at those who were building her house,—is incompetent, and does not tend to show her insanity or testamentary incapacity.

6. Testimony that a sister of a testatrix became insane, and that her niece, at the age of 34, was sent to an asylum for treatment, is incompetent as tending to show her incompetency to make her will; no insanity being shown in any of her ancestors, and that of her sister being attributed by the physicians in charge of her case at the asylum to disease, and the characteristics of the malady in her sister and niece being in no respect similar to those claimed in her case.

7. A superintendent of an insane asylum, whose knowledge of a former inmate is derived solely from her record appearing

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upon the books of the asylum from the time of her admission until her death, is not competent to give an opinion as to what must have been her condition during the period of her confinement, his proposed answer being based upon the absence from the record of those things which he says would undoubtedly have been noted if they had existed.

8. Instances of forgetfulness alone are no evidence of incompetency in a testator to make a will, nor are they a sufficient basis for expert testimony on the question of his sanity.

9. A hypothetical question which, while mentioning some things which would possibly be evidence of some mental derangement, refers to facts which, standing alone or in connection with other things, have no tendency to show insanity or incompetency in a testator at any time, is incompetent.

10. Contestants of a will will not be permitted to introduce contradictory evidence upon a given point, and then base hypothetical questions upon the theory that some of their witnesses are correct and others mistaken, or that some have testified truthfully and others falsely.

11. It is eminently unfair, in a case involving the contest of a will on the ground of the mental incompetency of the testator to make it, to select a few facts which tend naturally to show competency and sanity, and ask an expert witness, who has testified that in his opinion the testator was insane, whether such facts change his opinion.

12. It requires a less degree of capacity to make a will than a contract, and when a testatrix is able to recognize her friends, relatives, and acquaintances, to make contracts, to know her property and tell what it is, and to take care of and manage it, the law says she is capable of disposing of it by will; and medical experts cannot set aside the law by stating that those facts make no difference with their opinions.

13. The competency of expert testimony, where questions of insanity are involved, is recognized by this Court in many decisions; but it must not be forgotten that in all cases of importance it is the unfortunate fact that we find these experts arrayed against each other; citing *Beaubien v. Cicotte*, 12 Mich. 501.

14. The object of expert testimony is to enlighten the jury upon those facts which need interpretation, and all facts should be excluded from hypothetical questions which the jury can interpret as well as the expert.

15. No more important duty is devolved upon trial courts in cases involving expert testimony than to see that hypothetical ques-

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tions are framed upon a proper basis, and to instruct the jury as to the consideration and weight they should give to them.

Error to Wayne. (Hosmer, J.) Argued October 7, 1891. Decided December 21, 1891.

Appeal from disallowance of probate of will. Reversed. The facts are stated in the opinion.

George H. Prentis, for proponents and appellants, contended:

1. Long hypothetical questions, reciting a great number of facts, are very objectionable; citing *People v. Brown*, 53 Mich. 531; *Higbie v. Insurance Co.*, 53 N. Y. 603; *State v. Hanley*, 34 Minn. 430.
2. An order should be entered reversing the judgment, without a new trial, and directing that the will be admitted to probate; citing *Millar v. Toulmin*, 17 Q. B. Div. 603. The circuit court may make such order or decree as the probate court should have made, or such order as law and justice shall require (How. Stat. § 6789), and cannot the Supreme Court do so?

Alfred Russell, of counsel, for proponents and appellants, contended:

1. This case is one of a class looked upon with disfavor by this Court, where persons of property were treated as sane in business before death, and afterwards are charged with insanity; citing *Pierce v. Pierce*, 38 Mich. 420; *Fraser v. Jennison*, 42 Id. 227.
2. When witnesses give their opinions as to the condition of the testator, they must give the *facts* on which their opinions are grounded, so that the court and jury may see whether the opinions have been formed by standards altogether incorrect and misleading, the opinions themselves being consequently worthless; citing *Spratt v. Spratt*, 76 Mich. 384; *Rice v. Rice*, 50 Id. 455; *Hoban v. Piquette*, 52 Id. 346; *Wurzell v. Beckman*, Id. 480.
3. The opening of counsel for contestants was such as to demand a reversal of the judgment; citing *Porter v. Throop*, 47 Mich. 313; *Maclean v. Scripps*, 52 Id. 286; *Scripps v. Reilly*, 35 Id. 371; *Rickabus v. Gott*, 51 Id. 227.
4. The statement by the counsel for contestants that the law pre-

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sumed this will fraudulent for undue influence was not a correct statement of the law. *Schofield v. Walker*, 58 Mich. 96, decides no such thing. There a woman willed her property to her pastor to the exclusion of her niece, and the will was upheld.

5. The doctrine of undue influence adopted in courts of equity in regard to gifts *inter vivos* (*Norton v. Relly*, 2 Eden, 286; *Lyon v. Home*, L. R. 6 Eq. 655; *Thompson v. Hefferman*, 4 Dr. & War. 285; *Nottidge v. Prince*, 2 Giff. 246) does not apply to the making of wills; citing *Parfitt v. Lawless*, L. R. 2 P. & D. 462, 27 Law T. (N. S.) 215, 21 Wkly. Rep. 200.

6. It is settled that the question is as to actual capacity, not before or after, but at the actual time of the execution of the will; citing *Leech v. Leech*, 21 Penn. St. 69.

7. The security of private property has been so much shaken by contested will cases that our Legislature provided by Act No. 25, Laws of 1883, for the *ante mortem* probate of wills; and in passing upon said statute in *Lloyd v. Wayne Circuit Judge*, 56 Mich. 241, Mr. Justice CAMPBELL said that it "was probably designed to prevent the unseemly and disgraceful attempts, too often made, to defeat the enforcement of the last will of persons whose competency to deal with their own affairs was never doubted or interfered with;" and he afterwards suggested as a remedy the passage of a statute declaring that no will shall be held invalid for want of testamentary capacity in the testator, unless within one year prior to the date of the will the testator had been put under guardianship.

Griffin & Warner, for contestants.

Otto Kirchner, of counsel, for contestants, contended:

1. The first assignment of error considered in proponents' brief relates to the opening of counsel for contestants. We reply, in the first place, that the statements complained of were all substantially borne out by the testimony. But, even on proponents' theory, they have nothing to complain of in the opening, to no part of which was any objection taken. No ruling of the court was called for with respect to any part of the opening, and consequently no exception was taken to any ruling with respect to the opening. Attention is further called to the fact that the objection raised in this Court is only to the statements of counsel as to what he expected to prove. No case can be found where a judgment was reversed under circumstances such as are here presented; citing and commenting upon the following cases: *Scripps v. Reilly*, 35 Mich. 383; *Porter v. Throop*, 47 Id. 313; *Maclean v. Scripps*, 52 Id.

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222, 223; *People v. Wilson*, 55 Id. 513; *People v. Welch*, 80 Id. 619; *Campbell v. City of Kalamazoo*, Id. 655; and the judgment in *Richabus v. Gott*, 51 Id. 227, was not reversed because of any statement of counsel; and, finally, the assignment of error is too general, covering 15 distinct portions of the opening; citing *Pratt v. Burhans*, 84 Mich. 487.

2. The objection that certain questions appearing in the depositions are leading is untenable. No objection was taken at the time to the form of any of these questions, and they cannot be made on the trial of the cause when the deposition is offered in evidence. But, aside from any such consideration, the questions in the main were not leading, within the decision in *McKeown v. Harvey*, 40 Mich. 226, where it was held that a leading question points out the desired answer, and does not merely call for an affirmative or negative answer.

3. A great number of the contestants' witnesses who had known and observed Mrs. King, some of them for a period of 50 years prior to her death, ventured an opinion as to her mental capacity. These questions were put in various forms, such as whether, in the opinion of the witness, she had mental capacity to comprehend the paper offered as her will; whether she had sufficient mental capacity to bear the will in her mind, to remember its different parts, etc. These questions were objected to generally as leading and incompetent; but it is submitted that the form of the inquiries, as well as their subject-matter, was clearly competent, according to the ruling of this Court; citing *Porter v. Throop*, 47 Mich. 313; *Fraser v. Jennison*, 42 Id. 216; *Beaubien v. Cicotte*, 12 Id. 460.

4. It is also insisted that many of these non-expert witnesses had not stated sufficient facts upon which to base an opinion touching the mental competency of Mrs. King. A witness may express an opinion formed by personal observation of facts or *phenomena* so numerous and evanescent that they cannot be stated or described so as to enable persons not eye-witnesses to form an accurate judgment as to them, as to which, therefore, no better evidence than such an opinion can be obtained. This doctrine has received frequent recognition from this Court; citing *White v. Bailey*, 10 Mich. 155; *Beaubien v. Cicotte*, 12 Id. 501; *Kempsey v. McGinniss*, 21 Id. 138; *Rice v. Rice*, 50 Id. 454.

5. Objection is made to a question because it related to Mrs. King's mental condition three years prior to the time of making her will, but this Court held in *Hoban v. Piquette*, 52 Mich. 362, that an inquiry into the mental condition of the testator within 20 years of the making of his will was competent; citing, also, *Conely v. McDonald*, 40 Mich. 150.

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6. The facts that a sister of Mrs. King was at one time confined in an insane asylum in Connecticut, and afterwards in one in Vermont, where she died, and that her niece was a patient at a Michigan asylum, were pertinent to the inquiry, as bearing upon the mental condition of Mrs. King, to whom both persons sustained close consanguinital relations; citing *People v. Garbutt*, 17 Mich. 9; Busw. Insan. § 235 *et seq.*, and authorities there collected.

7. The official records of the asylum were properly received in evidence. The person who made the entries was dead, and they were shown to have been made at the time and in the regular course of business; citing *Sisson v. Railroad Co.*, 14 Mich. 489; *DeArmond v. Neasmith*, 32 Id. 231; *People v. Dow*, 64 Id. 717; *Thurstin v. Luce*, 61 Id. 298; *Inhabitants of Townsend v. Inhabitants of Pepperell*, 99 Mass. 40.

GRANT, J. Mrs. Adaline King died in Detroit, November 9, 1886. She left a will, dated July 31 of the same year, by which she devised to Rachel L. Doty, her husband's sister, her homestead in Detroit, her wearing apparel, jewelry, household furniture, pictures, and silverware; to John H. Prentis, a son of Browse T. Prentis, a gold watch and chain; to Mathew Huss, $500; and to Cora Doty, $50. All the residue of her property she directed to be sold, and divided into seven parts, and devised two of said parts to George H. Prentis, and the other five to other legatees, five in number, who were relatives of her husband. The will was admitted to probate by the probate court without contest, and on the last day provided by the statute contestants appealed to the circuit court, where a trial by jury resulted in a verdict against its validity.

Mrs. King was about 67 years old at the date of the will. Her husband had died shortly before. She had no children. The contestants were her heirs at law, being her nephews and nieces. An enmity of long standing existed between her and her brother and sisters and their families, the reason of which it is unnecessary to state. This fact is of importance in view of the opening

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statement of counsel for contestants to the jury. Mrs. King was under no more obligation to these relatives than she was to the legatees named in her will.

The will was contested upon two grounds,—undue influence and incompetency to make it. The burden of proof in both of these particulars was upon the contestants, and it was incumbent upon them to produce positive proof in support of either one or both of these propositions to entitle them to a verdict. After permitting arguments to the jury for six days, the circuit court took away from the consideration of the jury the question of undue influence, holding that the contestants had made no case upon this point. Several errors are alleged, which will now be disposed of in their order.

1. In his opening statement to the jury counsel for contestants, after referring to the provisions of the will, said:

"Now, the law says, gentlemen of the jury, that when a will—an unnatural will, as this is—gives property away from kindred, the law draws an inference that that will was procured by fraud."

He further, in the same connection, argued to them that in this case the burden of proof was upon the proponents to show both lack of undue influence on the part of the legatees, and the competency of the testatrix. Counsel furthermore did not confine himself in his opening to a brief statement of the facts he proposed to prove, but argued questions of law and fact. He also stated facts which he proposed to prove, but which were not proven upon the trial. Counsel stated that Mrs. King was at one time taken to a sanitarium, and then used the following language:

"Dr. Gallagher, a physician there, wanted to give her some pills. He brought them to her, and she said they were flies. She says, 'They are not pills. I shan't take them.' 'Why not?' 'They are flies.' 'Why, Mrs. King, look at

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them. Those are not flies. Examine them. Here they are; six pills; round and smooth and nice.' 'No, sir; you can't fool me; they are flies.' Now, the doctor wanted to know just how far this woman would carry this delusion,—whether it was put on or whether it was genuine, —and so he went out and got six flies, and killed them, and he put the pills on the table, and said, 'Mrs. King, there are the flies,' and he put on the table the six flies, and said, 'Mrs. King, there are the pills; now take your choice.' She says, 'I will take the pills,' and she gathered up the six dead flies, and ate them."

There was no foundation in the proofs adduced for this extravagant statement.

Counsel, in their opening to the jury, should be limited to a brief and concise statement of the facts which they propose to prove. It is likewise the duty of counsel to inform himself as to these facts, and to satisfy himself of his right to prove them. The opening is not the place for argument. The opening in this case was such as could scarcely fail to create a prejudice in the jury, and prevent a fair and impartial trial. As applicable to this branch of the case, I quote with approval the language in *Porter v. Throop*, 47 Mich. 320, Mr. Justice COOLEY speaking for the Court:

"We should impeach the judgment and legal knowledge of counsel if we were to assume that in making this opening he was putting before the jury those facts only which on reflection he had satisfied himself he had a right to prove."

Other language might be quoted from this opening statement fully as objectionable as that above given, but the latter is sufficient to illustrate its character, and to show the danger of permitting counsel to argue their cases to the jury upon a mistaken view of the law, and their own statement of the facts without proof. Especially is it the duty of courts to exclude from the jury the unjustifiable statements of counsel, as well as immaterial

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and incompetent evidence, which might prejudice a jury, in a case involving the validity of a will, when the soundness of the testatrix's mind was not questioned during her life-time by any of her relatives, and she was left in the entire control and management of her large property until her death. *Pierce v. Pierce*, 38 Mich. 420. For this error alone the verdict in this case should be set aside.

2. It is urged by the proponents that error was committed in permitting counsel for contestants to argue to the jury the question of undue influence. They urge that this ruling should have been made at the close of contestants' testimony, and that it is a fair presumption that the jury were prejudiced by the arguments of counsel. It is stated by proponents in their brief that no reply was permitted by them to the jury upon this branch of the case. If this is so, the record fails to show it. The record contains no indication that the circuit judge ruled upon this until after the arguments of counsel for both sides. It is, of course, important that such questions be eliminated from the consideration of the jury as soon as possible. It is the better practice to have such questions discussed in the absence of the jury, where it is claimed they are questions of law and not of fact. Then there exists no danger of prejudice. In the case of *Fraser v. Jennison*, 42 Mich. 214, the question of undue influence was eliminated from the case upon the opening statement of counsel for contestants. But it is quite possible, even where the question is first argued before the court alone, that the judge may not become convinced of his duty in the matter until after the arguments to the jury. In such case we cannot presume that the jury will not follow the instructions of the court, and leave the question out of their consideration. The result of this contention would be that a

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new trial must be ordered in every case where the court has taken from the consideration of the jury any question which has been argued before them. I find no authority for such a rule, nor do I think it founded in reason.

3. A large mass of immaterial and incompetent evidence was admitted. It would be a long and tedious task to select and point it out. It is unnecessary to do so, for a few instances will illustrate it all, and serve as a guide upon a second trial of the cause. A large amount of this testimony came from those who were employed in building a house for the testatrix in 1885. An instance of this is from one Edmund Austin, who testified as follows:

"I am a plasterer. I knew deceased in 1883. Did plastering on the job on Woodward-avenue house, under Stevens & Decker contract. Was there, off and on, for about a month. I have no doubt I saw Mrs. King five or six times. Talked with her mainly about the plastering. She seemed to take an interest in it, about as a wife would about her husband's interest. Also talked with her about plastering in old times. She was able to talk a long time without stopping. She had more to say than I did. Don't think I could remember definitely what she said. One thing I remember: I talked with Mr. and Mrs. King both about pay, and I remember she said she was gratified that Mr. King had paid me. If I remember Mrs. King did not dress up much. I did not know her prior to that time. * * * I thought her conversation was quite erratic,—rather eccentric, curious,—that is the impression; mind you, I cannot remember distinctly any particular conversation, but that was the impression I gathered of her. Well, a curious, erratic sort of a woman."

Witness was then shown the will, and asked his opinion upon her mental capacity to make it; and he replied that he thought it "would be a very difficult matter for her mind to master it."

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One George Hanley, a plasterer, did some work for her in her house in 1877 or 1878; again did like work for her in 1885.

"Saw a change between 1877 or 1878 and 1885. In 1885 she was fond of talking on different subjects,—rambling, disconnected conversations, different altogether from what she was when I first knew her. * * * She was continually talking, and introducing various subjects, which had no distinct dependence on anything that was being done there by me. That was the principal thing that I saw in her. I did not test her memory. She said she would like to have some additional centers in the building beyond what the specifications called for, and that she was willing to pay for them, and I put them in. I have not received my pay yet. She said when they were settling up the whole business in connection with the building she would see to it. I saw her twelve or fifteen times, probably."

This witness then testified that he thought her mentally incapable of comprehending the will. John Scott testified:

"I first knew Mrs. King in the summer of 1885. Saw her at her house on Woodward avenue. She sent for us to get up plans for house on Hancock avenue,—wanted us to make a sketch of the house for her. Mr. King was present at first meeting. They both transacted the business. I was there half or three-quarters of an hour. She did most of the talking. I saw nothing unusual. Next interview she came to our office. She appeared to be unsettled as to what we were to do. Wanted it done different from what we were to do. I can't remember the conversation. I saw her in our office several times after this; once with Mr. King, and several times alone. I thought she was flighty in her notions. She changed her mind almost every time she came there. It was more particularly as to the cost of the house. She wanted a certain number of rooms for a certain price. She wanted to build a house worth $8,000 or $10,000 for about $3,500."

Witness then gave his opinion that Mrs. King did not possess sufficient mental capacity to understand the will,

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and sufficient active memory to retain it in her mind without prompting.

Albert E. French drew the plans and specifications for an addition to Mrs. King's house in the summer of 1883. He never had any conversation with her except upon this building. He testified that she wanted certain arrangements made in the construction of the building, while her husband wanted it as the architect thought best. She wanted the stairs in a certain place, and different arrangements from what Mr. French thought was proper. He said her method was not consistent with good building or construction. When asked if he noticed any eccentricities about her he replied:

"Well, she would come out on the joists before the floor was laid in the addition,—the second floor joists, which were on a level with the floor where she was living,—and talk to the builders and to me, about the work, of course. * * * Her manner was excitable."

Witness further testified that he could not carry on a connected conversation with her. When asked why, he replied:

"Because she could not comprehend; that is, I considered that she could not comprehend it. I am speaking more particularly in connection with this work that I had in hand there."

Charles Weitz, a painter, worked upon the house in 1885 for Mrs. King. Saw her most every day for two weeks. Formed an opinion as to the state of her mind, his reasons for which were:

"Well, she used to talk too much; and one day I came there, and she was running around the house screaming, and had her dress open in front. She was in the kitchen. Mr. King was there. I don't know what it was that she was screaming. She talked and screamed both,—hollered. * * * She was scolding with the men. They did not do the work right; and she said she wanted it another way,—she wanted it done a different way, you know. She

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did not want the work done that way; and she was fussing around with the men, and scolding. She changed her mind as to colors. She did not like the carpenter's work, and was kicking about it. She wanted more work done than the specifications called for, and the carpenter would not do it. * * * She said one day that Mr. King's brother was not a very smart man; that her husband was the smartest; and she was sorry that he was not a lawyer,—something like that."

Witness was then asked his opinion of her mental capacity to understand this will, to which he replied: "I doubt it. I doubt whether she would understand the last part of it."

Much other testimony of like character with the above was introduced. Granting it all to be true, what tendency has it to prove the testamentary incapacity of Mrs. King? If Mrs. King's testamentary capacity is to be determined by the fact that she talked more than some others, that she seemed erratic, that she talked upon various subjects, that she changed her mind as to the cost of her house, or because she wanted different arrangements made from what an architect thought proper or consistent with good building, or because she once got angry and screamed, or because she scolded the men who were doing the work, or changed her mind about colors, or became enraged and angry at those who were building her house, it is quite apparent that not many wills could be sustained. Such testimony does not, in my judgment, rise to the dignity of evidence. As was said in *Fraser v. Jennison*, 42 Mich. 227:

"Any one of those circumstances may co-exist with a perfectly sound mind, and any one of them may be looked for as not an improbable misfortune or peculiarity in the lot of a perfectly sane person."

All this testimony was incompetent, and should have been excluded. It did not tend to show insanity or testamentary incapacity. The witnesses had no such knowl-

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edge, and testified to no facts, which rendered their opinions as to her competency admissible. If wills are to be set aside upon such opinions, the ability to make a valid one will be almost impossible, and the power to make them might as well be entirely taken away. The language of this Court in *Fraser v. Jennison,* at page 227 *et seq.*, will be found quite applicable to the present case.

4. Evidence was introduced by the contestants tending to show insanity in a sister of Mrs. King, who died in 1863, and in a niece, Miss Octavia Bates, one of the contestants, and a witness in this case. To show insanity in the sister, contestants introduced in evidence the record of the sister's confinement in a retreat for the insane at Hartford, Conn., and a like record of her confinement in the Vermont asylum for the insane. The superintendent of the retreat at Hartford testified that they generally record upon their books, kept in the retreat, the name, age, residence, place of birth, whether married or not, if married, the number of children, if any, occupation, condition of previous health, whether any other members of the family have been insane, whether the patient has been afflicted with certain diseases, etc.; also the history and symptoms of the disease in the patient. The record showed that this sister was first taken to the retreat in 1840; that she was discharged at the end of three months, and was received and discharged several times after that up to the year 1858, when she was transferred to the Vermont asylum. The following is taken from the record of the retreat:

"She is a native of Saybrook, Conn. Single. Age, said by her brother to be either 25 or 26 years. She had a paroxysm of insanity about eight years prior, which continued three or four weeks only. Since that time she had appeared to be perfectly sound in mind until some time during January last, when some aberration of mind

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began to be noticed. Her friends are unable to assign a satisfactory cause for the present attack. By some it is attributed to scrofula. No member of her family or any of her relatives are known to have been insane. Her work has been very laborious (knitting seines), and in it she has appeared ambitious to excel others in the amount of labor she could perform. Since her insanity came on she has been very boisterous and talkative at times, and could illy bear any kind of restraint. She feels most hostility towards her family. Her appetite has been variable. Her natural disposition seems to be mild and amiable. Since the last attack she has received no regular attention from a physician, nor has she taken much medicine.

"Address, Charles Williams, Saybrook, Conn.

"Discharged June 9, 1844, cured."

Upon her fourth admission to the retreat the record states:

"She was, and we suppose she is now, troubled with scrofula complaint, and we believe that to be the cause."

All the record in the present case shows of the insanity of the niece is her own testimony, in which she states that she was taken ill in August, 1880; that she was told she was ill for 21 days; that when she awakened to consciousness she was in the woods at the Pontiac asylum, with a girl 20 years old, who told her that she had been very ill; that the last knowledge she had of Detroit was about the last week in August, when she fell asleep, and dreamed that the city was on fire; and that she at that time remained in the asylum about six months. Soon after Mrs. King's death this witness testified that she again went to the Pontiac asylum, at the suggestion of her physician, where she remained about four months. This testimony was objected to as immaterial. One of the counsel for contestants then stated to the court that it was competent, as bearing upon the physical condition of the witness. Upon the statement of the presiding judge that he thought he would exclude it, the other counsel stated:

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"Then I will offer to prove, your honor, that the whole strain in connection with the matter made her sick,—so much so, she was obliged to return to Pontiac about November 20,—as bearing upon the question as to her being too ill to attend, and that illness was continuous, and existed both before and after."

The court then admitted the testimony for the purpose of showing insanity in the family. Is such testimony competent when the sole question is the testamentary capacity of the deceased? This question must be answered, so far as this case is concerned, in the light of the facts that no insanity has been shown in any ancestor of Mrs. King; that the insanity of Mrs. King's sister is attributed by the physicians who had charge of her case at the asylum to disease; that the characteristics of the malady in her sister and niece are in no respects similar to those claimed in the case of Mrs. King; and that, therefore, no case of hereditary insanity has been established by the proofs.

Counsel for contestants urge that such evidence is pertinent because of the close consanguinital relations of these persons to Mrs. King. The only authorities which they cite are *People v. Garbutt*, 17 Mich. 9, and Busw. Insan. § 235, and the authorities there collected. All the authorities cited, save one, are criminal cases, and in dealing with criminals the law in many respects recognizes a different rule from that in civil cases. It by no means follows that because such a rule prevails in the criminal law it must be adopted in the class of cases now under discussion. The exception above noted is *Snow v. Benton*, 28 Ill. 306. But it does not appear that the court there expressly passed upon the question.

Insanity arises from various causes. It may be produced by disease; by injury; by overwork, mental or physical; by grief; by sudden calamity, etc. Such insanity is not hereditary. Whether it may be hereditary in the direct

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lineal descendants of those so afflicted is immaterial here. Such is not this case. Upon what sound principle can Mrs. King's competency to make a will be doubted because her sister became insane from disease, and her niece, at the age of 34, was sent to an asylum for treatment? The circuit judge, in his charge to the jury, did instruct them that the voluntary retirement of Miss Bates to the asylum the second time, and her testimony in regard to it, were not sufficient to warrant any inference of insanity on the part of Mrs. King, and was incompetent for any purpose. Even in criminal cases it is laid down as the rule—

"When the existence of hereditary insanity is alleged as an excuse for crime, it must appear that the kind of insanity proposed to be proved as existing in the prisoner is no temporary malady, but that it is notorious, and of the same species with which other members of the family have been afflicted." Busw. Insan. § 236; *State v. Christmas*, 6 Jones (N. C.), 471.

To my mind, this rule, as applied to criminal cases, has much good sense to commend it; but, in my judgment, reason and common sense approve it as the proper rule to be adopted in the present case. Tested by this rule, all the evidence of the insanity of Mrs. King's sister and niece should have been excluded.

5. The present superintendent of the Vermont asylum was shown the record of this sister, appearing upon the books in that institution. So far as applicable to the question now presented, these entries, 11 in number, extended from November 2, 1858, to April 19, 1863, when she died. In their order they are as follows:

"No change since admission.

"Enjoys very good physical health.

"There is no change in the state of her mind; physically she is feeble.

"Physical health better; no change in state of her mind.

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"No important change.

"Enjoys very good physical health; no improvement in her mind.

"No change.

"Enjoys very good physical health; no change in the state of her mind.

"No material change since the above date.

"There has been no change in the case of Miss Williams, since she has been in this asylum, in the type of her malady.

"Died of exhaustion."

The superintendent was then asked to state his opinion as to what must have been the condition of Miss Williams from the time of her admission to her death. This question was incompetent. The witness had never seen Miss Williams, knew nothing except what this record showed, and bases his answer upon the absence from the record of those things which he says would undoubtedly have been noted if they had existed. Objections were raised to the admission of these records, but the above rulings make it unnecessary to refer to them.

6. A medical expert was placed upon the stand, and asked the following question:

"Now, doctor, I will ask your opinion as to the mental condition of Mrs. Adaline King on the 31st day of July, upon this state of facts: She died at Detroit on the 9th of November, 1886. She was then 67 years old. The immediate cause of her death was dysentery. It began about November 3 of the same year, soon after having eaten some chicken-broth that had been kept in the room for three days. She had at that time an old pasteboard box, in which she put crackers and cakes and meat in order to keep them from others, who she feared might eat them. She took the chicken-broth to her room to make sure no one else in the house should eat it. She was told that the chicken-broth was not fit to eat, but she insisted upon eating it. Her husband, to whom she was married in 1850, died in the month of June prior to her death. She had no children. In the month of December following her marriage she purchased

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two lots on Woodward avenue for $1,100. They are now worth not less than $75,000, and probably more. She also owned a house and lot on Hancock avenue, which she built in 1885, and completed in 1886. This, with the Woodward-avenue lots, constituted substantially all of the estate of which she died seised. In her early life she was tidy in her person, tasteful in her dress, and refined and gentle in her manner. In 1872 she had prolapsus of the womb, from which she suffered more or less, with varying intensity, until she died. At the same time she complained of distress in her stomach, and was subject to paroxysms, which increased in intensity and frequency of duration on the 22d of July, 1886, and until the day of her death. Her attendant physician found her complaining with distress of the stomach, of inability to digest her food. He found her nervous system much debilitated, and suffering from paroxysms, during which time she was very weary, and would not remain quiet for sufficient time to enable the physicians to take her temperature. Her pulse was about 80 beats to the minute. It was discovered that the distress of which she complained was greatly exaggerated, and that she was possessed with a desire to impress those about her with an exaggerated idea of her sufferings. When her mind could be diverted she would forget all her ailings. A *post mortem* examination showed she was not suffering from any chronic disease of the stomach. The intestines showed signs of acute inflammation. In the month of September or October, before she died, she came down-stairs one morning between six and seven o'clock, and said to her late husband's nephew in reference to an $18 grocery bill that had been contracted: 'What do you mean by running up such an enormous bill? When you run up such a bill as that I feel as if I could take this knife and kill you;' thereupon taking a large knife in her hand. Mr. Doty thereupon told her, 'You had better lay that knife down,' and then took hold of her arm, and led her up-stairs. Another occasion,—about five or six years ago,—she came down in Mr. Doty's room, and asked him if she could not lay down on his bed, it looked so nice; and Mr. Doty told her that she might, and she thereupon did so. Upon the subject of the incident with Mr. Doty she told her nurse, Mrs. Narr, that she had picked up a knife, and that Mr. Doty put her out of the room, and that the $18 grocery bill was exorbitant. What, in

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your opinion, was her mental condition on the 31st day of July, 1886, upon the facts that I have recited?"

The question was admitted under objection, and the witness replied:

"I am unable to form upon that hypothetical question an opinion. I want to hear a little more."

The witness was further questioned upon this hypothetical question, but again said he did not think it contained sufficient *data* to form an opinion from; and the court thereupon excluded the question. Counsel then submitted the following question, under objection of proponents' counsel:

"Now, doctor, if you pay attention, in 1885 she was engaged in building the Hancock-avenue house. She visited it frequently, and gave directions to the workmen. When they complied with her directions she would within a day, and sometimes within two hours, deny having given such directions, and find fault with the men. As far back as 1878 she took baths at a public bathing establishment, and did not have sufficient memory to remember having taken her bath from one day to the other. At times she expressed a desire to come out of her bath, and, when preparations were made to that end, she would deny that she had expressed a desire to come out. In the fall of 1884, while taking her meals at a restaurant, she would forget what she ordered, and deny that she had ordered the things that were brought to her, and insist that she had ordered something else. She would ask Mr. Mix, at whose house she was staying, to take her for a walk, and, when he did so, inquire of him the reason for so doing, and insist that she had not so requested him. Upon these facts, can you state what was her mental condition on the 31st day of July, 1886, independently of the facts embraced in the first question?"

After asking counsel whether he should consider this question in connection with the last one, and after being told, "No, independent of it," witness replied: "I should say she was demented. She was insane." He was then asked what his opinion was, taken in connection with

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the facts stated in the first question, and his reply was again that she was insane, and that, in his opinion, she did not possess mental capacity to understand or make the will.

There are some things mentioned in the first question which would possibly be evidence of some derangement of mind. The second question involved simply instances of forgetfulness, all of which happened more than a year previous to the execution of the will. Instances of forgetfulness alone are no evidence of incompetency in a testator to make a will, nor are they sufficient basis for expert testimony as to sanity. I am unable to conceive how the learned physician could have answered this second question in the manner he did. It can only be accounted for upon the theory that he had in his mind other supposed facts in regard to the condition of Mrs. King. This question was incompetent. The first question was also objectionable, in that it referred to facts which, standing alone or in connection with other things, had no tendency to show insanity or incompetency at any time. The facts that she died of dysentery; that she was married; that her husband had died in June previous; that she had no children; that she early purchased property, which had greatly increased in value; that she complained of distress in her stomach; that it was discovered that her distress was greatly exaggerated; that she desired to impress those about her with an exaggerated idea of her sufferings; that she forgot her ailings when her mind was diverted; that a *post mortem* examination showed that she had no chronic disease of the stomach; that her intestines showed signs of acute inflammation,—had no tendency whatever to show insanity, much less testamentary incompetency.

The only other circumstance worthy of mention stated in the first question as a basis for the opinion of the physician

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is that in regard to the grocery bill. The statement in the question is not in accordance with the evidence, which shows Mrs. King's statement to have been, "When you run up such bills I feel like killing myself." The difference between the two statements is apparent. We are not informed what this grocery bill was, nor the circumstances under which it was contracted. But, be the circumstances what they may, is it anything more than an ebullition of temper, prompted possibly by a somewhat miserly disposition? If her language had been much stronger and her anger greater, it would still fall far short of evidence of insanity, or incapacity to execute the will. There was nothing in either or both of these questions to justify either the question or the answer.

Several other hypothetical questions were asked this expert, and in one of them it was stated, among other things, that Mrs. King had once stated in the spring of 1886 that she had no stomach, and to another that her stomach was bad; that she complained of pain in her stomach, of dyspepsia, and of inability to eat, yet she ate her regular meals, had a good appetite most of the time, and sometimes ate to repletion. I am not versed in the various forms of dyspepsia, nor of the symptoms thereof, nor am I aware that eating to repletion will not sometimes cause distress in the stomach and dyspepsia. If a declaration by a dyspeptic that he has no stomach, or that his stomach is bad, is evidence of his mental incapacity, dyspeptics may as well refrain from making wills. But both the witness and the jury were by this question given to understand that Mrs. King was not affected with dyspepsia, and that in this respect she was under a delusion. Two physicians, witnesses for contestants, one of whom treated her in 1884, 1885, and 1886, and the other, an old and distinguished physician, who had known Mrs. King for 36 years before her death, and

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had treated her, both testified that she was afflicted with dyspepsia. Contestants must be consistent in the presentation of their case. They will not be permitted to introduce contradictory evidence upon a given point, and then base hypothetical questions upon the theory that some of their witnesses are correct and some of them mistaken, or that some have testified truthfully and others falsely. This witness further testified as follows:

"*Q.* Suppose, while she was building her house in 1885, she went up there, and recognized the carpenter, and recognized the painter, and recognized the mason, and never made any mistake as to who was which, never would call the painter the carpenter or the carpenter the painter, and was able to recognize her friends, and was able to recognize what property she possessed, and to tell others what property she had, and to bargain with the nurse as to the amount she was to receive per week for attending her; supposing all those things were so, would they modify the opinion that you have expressed concerning her?

"*A.* They would not.

"*Q.* Will you state why?

"*A.* From the fact that insane persons are often able to do that, and at the same time not be able to transact other business. The faculty is seldom lost to recognize friends or individuals, but the ability to reflect, to consider the relations of things one to another, is lost at the same time."

This question was incompetent for two reasons:

1. Because it did not contain a full statement of all the facts which tended to show competency. It is eminently unfair in such cases to select a few facts which tend naturally to show competency and sanity, and ask the expert whether that changes his opinion. All the facts tending to show sanity should be included, were the question competent.

2. Every person is entitled to the natural inference to be drawn from his acts and conduct. It was the province of the jury to determine these facts, give them their

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natural interpretation, and consider the opinions of the expert witnesses in connection therewith. It requires a less degree of capacity to make a will than it does to make contracts, and when one is able to recognize her friends, relatives, and acquaintances, to make contracts, to know her property and tell what it is, and to take care of and manage it, the law says she is capable of disposing of it by will; and medical experts cannot set aside the law by stating that these facts make no difference with their opinions.

This witness further testified that the insanity of Mrs. King's sister would have an important bearing in determining the question of her own sanity. The unfairness and evasiveness of this witness appear upon his cross-examination. Upon being asked whether the fact that her sister's insanity, if produced by physical injury to the brain, would have any tendency to prove that Mrs. King inherited insanity, he replied:

"I have already said that traumatic injuries sometimes produce insanity."

Upon being asked what there was in the question submitted to him on direct examination to indicate that the sister inherited insanity, he replied:

"I have already stated that Mrs. King was insane, and the fact that she was insane and her sister insane; there are two persons in the family insane; therefore there must be a predisposition."

The sanity of Mrs. King was the issue upon which he was testifying. The contestants were endeavoring to draw the inference of predisposition, because of the insanity of her sister; but the witness draws his inference of predisposition from the fact that in his opinion the two were insane. Such testimony is utterly worthless, and cannot assist the jury in reaching correct results.

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He further testified on cross-examination that *prolapsus uteri* may be consistent with sanity, and it may not be. He is questioned as follows upon this point:

"*Q.* What are the great majority of those cases, insane persons or sane?

"*A.* A good number of them have become insane.

"*Q.* A great majority of the persons are sane, are they not?

"*A.* Yes, sir; and a good many insane. * * *

"*Q.* In 1885 she was engaged in building the Hancock-avenue house. She visited it frequently, and gave directions to the workmen. Those facts are consistent with sanity are they not?

"*A.* I think, taken separately, I could not decide the question.

"*Q.* When they complied with her directions?

"*A.* I don't think it would be inconsistent, taken separately, in her case.

"*Q.* Is the fact that in 1885 she was engaged in building the Hancock-avenue house, and visiting it and giving directions to the workmen, any evidence to your mind of her insanity?

"*A.* I am not able to form an opinion on that question.

"*Q.* Separately, are not those facts consistent with sanity?

"*A.* Not necessarily; no, sir."

Every one must know that the facts above mentioned are consistent with sanity, and are inconsistent with insanity.

The competency of expert testimony, where questions of insanity are involved, is recognized by this Court in many decisions. But it must not be forgotten that in all cases of importance it is the unfortunate fact that we find these experts arrayed against each other. *Beaubien v. Cicotte*, 12 Mich. 501. This case forms no exception. The object of such testimony is to enlighten the jury upon those facts which need interpretation. In these hypothetical questions all facts should be excluded which the jury can interpret as well as the expert. The

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courts do not agree as to the value to be placed upon such testimony. No more important duty is devolved upon trial courts in these cases than to see that these questions are framed upon a proper basis, and to instruct the jury as to the consideration and weight they should give them. Enough has been said to point out the defects and errors in the expert testimony introduced by the contestants, and further discussion on that point is unnecessary.

7. Mrs. King visited some friends in New Haven, Conn., in October, 1884. The depositions of these parties were taken, showing the conduct and actions of Mrs. King during that visit, which the record shows were the most damaging of any. On cross-examination proponents offered in evidence certain letters written by Mr. Mix, at whose house she visited, and they were excluded by the court. These letters were written to the husband of Mrs. King, and contained no reference to the disgusting details testified to by them. These letters should have been admitted. They had a direct bearing upon the credibility of the witnesses.

8. On the cross-examination of Mrs. Mix, a witness for contestants, she was asked if Mrs. King, while visiting her, did not attend a banquet; to which she replied: "Not to my knowledge. I don't remember." Counsel then sought to call her attention to certain facts in connection with this banquet, evidently for the purpose of refreshing her recollection. This the court excluded. This was error. In view of the extraordinary testimony of this witness and her husband, a very broad latitude should be allowed in the cross-examination.

The record in this case contains 1,029 pages, and 278 errors are assigned. I deem it unnecessary to notice them

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in detail. I think they are already sufficiently covered by the above opinion.

Judgment is set aside, with the costs of both courts, and a new trial ordered.

The other Justices concurred.

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LEWIS M. CUTCHEON ET AL. v. AUGUSTUS BUCHANAN ET AL.

[See 79 Mich. 41.]

Fraudulent conveyances—Land contract—Equitable interest—Bill in aid of execution.

1. The fraud covered by How. Stat. § 6203, which voids conveyances or assignments of real and personal property, or any interest therein, if made with intent to hinder, delay, or defraud creditors, is not that practiced upon the assignee or grantee of the debtor, but upon creditors; and *actual* fraud need not be intended to render the conveyance void.
2. Where insolvent debtors gave a bill of sale of their personal property, and turned over a land contract upon which they had paid $50, in fraud of their creditors, but without any actual intent on the part of the assignee to defraud them, who paid the balance due on the contract, amounting to over $800, and took the deed in his own name, and after waiting several years, with full knowledge of the facts, certain creditors obtained judgments against the debtors, and levied upon said land and personal property to satisfy the same, and filed a bill in aid of said execution, the assignee will only be decreed to turn over to the complainants whatever interest the debtors have in the property, to be determined by ascertaining what he has received therefrom, and what he has in good faith expended, which can best be accomplished by an accounting in the court below.

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3. How. Stat. § 6108, authorizing the filing of bills in aid of executions, includes equitable as well as legal interests in lands, and covers a partially paid up land contract assigned in fraud of creditors; said assignor having at least an equitable interest, with the right to obtain the absolute title upon full payment.

Appeal from Kent. (Grove, J.) Argued October 15, 1891. Decided December 21, 1891.

Bill in aid of execution. Complainants appeal. Reversed, and decree entered in accordance with opinion. The facts are stated in the opinion.

Tatem & Quinsey (*Francis A. Stace*, of counsel), for complainants.

D. E. Corbitt (*E. A. Maher*, of counsel), for defendants.

GRANT, J. The bill in this case is filed in aid of two executions issued upon two judgments recovered by complainants against the defendants Augustus and John L. Buchanan and Mizner, November 9, 1887. The levy was made upon certain personal property and the real estate here in controversy. Upon the making of this levy defendant Corbitt sued complainant Cutcheon in trover for the personal property. The trial in that suit resulted in verdict and judgment for Cutcheon, upon the ground that the transfer by the Buchanans and Mizner to Corbitt was fraudulent as to creditors. This judgment, on appeal to this Court, was affirmed. *Corbitt v. Cutcheon*, 79 Mich. 41. The bill of sale then executed by them to Corbitt contained no reference to any real estate, and no other instrument than this bill of sale was ever executed by them to Corbitt. No right, title, or interest, therefore, to any real estate, passed by this transaction to Corbitt.

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At the time of this sale the Buchanans and Mizner were in possession of this land under a land contract upon which they had made a payment of $50. Subsequently, but prior to the complainants' judgments, Corbitt paid the amount due upon this contract,—something over $800,—and took the title in his own name. Complainants claim that Corbitt made these payments out of the proceeds of the sales of the personal property of the Buchanans and Mizner, and that this was done for the purpose of defrauding their creditors. While this land contract was not included, in express terms, in the bill of sale, yet it was turned over at the same time by Buchanan & Mizner to Corbitt, and was a part of that transaction, whereby they conveyed to Corbitt all their property. The court below found no evidence of any fraud practiced or intended to be practiced by Buchanan & Mizner on Corbitt, but that the sale was made in good faith, for the purpose of paying their creditors, and saving something out of the property for Buchanan & Mizner. The fraud covered by the statute is that practiced upon creditors, not upon the assignee or grantee of the debtor. It has been repeatedly held by this Court that actual fraud need not be intended in order to render such conveyance void. How. Stat. § 6203, and authorities there cited. It is sufficient if the conveyance operate to delay, hinder, or defraud creditors. I think the present case comes within that rule, and therefore find no reason for a different conclusion than the one reached in *Corbitt v. Cutcheon.*

But I find no evidence of any actual intent on the part of Corbitt to defraud, and upon this point the conduct of the creditors, in waiting several years, with full knowledge of all the facts, before taking any action, has an important bearing. It was decided in the former case that they were not estopped by their delay and

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apparent acquiescence in the transaction, and that decision must be final.

It is the province of equity to deal justly with all parties. It would certainly be inequitable to compel Corbitt to turn over to complainants property which he has paid for with his own money to satisfy their judgments against Buchanan & Mizner. It would also be inequitable to permit Corbitt to make any profit out of the transaction. It is equitable that he should turn over to complainants whatever interest Buchanan & Mizner have in the property. This must be determined by ascertaining what he received from the property turned over to him, and what he has in good faith expended. This can only be accomplished by an accounting, and the case will be remanded to the court below for reference to a commissioner for that purpose.

It is urged by defendants that this case is ruled by *Harwood v. Underwood*, 28 Mich. 427. We are unable to agree with this contention. In that case the debtor never had any legal or equitable title to the land. In the present case the land contract gave Buchanan & Mizner at least an equitable interest, with the right to obtain the absolute title upon payments. The statute authorizing these proceedings now includes equitable, as well as legal, interests in lands. How. Stat. § 6108.

Decree will be entered in this Court in accordance with this opinion. No costs will be allowed.

The other Justices concurred.

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ORISSA M. JONES v. THE PRESIDENT AND TRUSTEES OF THE VILLAGE OF PORTLAND.

Municipal corporations—Defective cross-walk—Trial—Statements of counsel—Evidence—Hearsay—Expert testimony—Hypothetical questions.

1. A physician cannot testify to exclamations of pain of an injured person during an examination made in contemplation of a suit to recover damages for the injury, he being employed to make such examination to enable him to be a witness in said case, nor can he testify to exclamations and statements made upon an examination had after the commencement of said suit for a like purpose; citing *Railroad Co. v. Huntley*, 38 Mich. 514.
2. It is not competent for a physician to testify to what the plaintiff in a negligence case told him as to how the injury was received for which suit is brought; citing *Dundas v. City of Lansing*, 75 Mich. 499; *Merkle v. Bennington Tp.*, 58 Id. 156.
3. In a suit to recover damages for injuries caused by a defective cross-walk, plaintiff's attorney offered to show the general unsafe condition of the walks of the village, and coupled the offer with the statement that the walks right along the street where the accident happened, for 80 rods, were not safe for a man who was in any way infirm, or for a lady, to pass along there at night without being injured or tripped up half a dozen times, which proposed testimony was objected to and excluded, but nothing was said by the court to the jury to correct the error in practice thus committed, which offer and statement are held reversible error; citing *Dundas v. City of Lansing*, 75 Mich. 499; *Tice v. Bay City*, 78 Id. 209.
4. It was held in *Mayo v. Wright*, 63 Mich. 32, that a question to an expert witness is not objectionable on account of its length, but that it should be reduced to writing, and embrace the whole question in a connected manner.
5. It is error to permit a witness to testify to his conclusion based upon facts in evidence before the jury from which they are as competent to draw a conclusion as is the witness.

Error to Ionia. (Smith, J.) Argued October 15, 1891. Decided December 21, 1891.

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Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

A. A. Ellis, for appellant.

Davis & Nichols, for plaintiff.

CHAMPLIN, C. J. This action was brought to recover compensation in damages for a fall caused by a defective cross-walk in the village of Portland, which the village authorities neglected to keep in repair. The plaintiff recovered judgment, and the defendant brings the case here by writ of error.

The injury was received on July 20, 1888, about 9 o'clock in the evening. This was on Friday; and on the evening of Tuesday, which was the 24th, Dr. Grant and Dr. Logan, of Ionia, came to see plaintiff. She had not at that time employed them, but they were employed by her husband, who was a lawyer. He engaged these physicians for the purpose of prescribing for his wife, and for the purpose of preparing them as witnesses to testify in a suit which was to be brought to recover damages against the village. The latter purpose would seem to be the principal one. Both of them understood that to be the object when they took the case and first went to see Mrs. Jones. During the summer previous Mrs. Jones had been ill, and she then had employed Dr. Alton and Dr. Hugg to attend her. Although she did not send for nor employ the Ionia physicians in the first place, she ratified what her husband had done, and submitted to an examination by and treatment from them. This suit was brought September 15, 1888, and some of these examinations were made before and some after suit brought. The physicians were allowed to testify to her complaints and to her statements of pain made during the examination made by them; also as to tenderness and

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pain in the region of her back, hip, and genital organs. They discovered a slight discoloration on the left hip, and a fullness at her right knee, which were the only indications which they found of any ailments, and which, independently of her assertions that she had been injured, they would have attributed to rheumatism.

The questions presented by the assignments of error upon this branch of the testimony are:

1. Is it competent for a physician to testify to exclamations of pain made by a party who is being examined by such physician, when such party contemplates bringing a suit to recover for the injury which she claims to suffer, and when such physician is employed with a view and for the purpose of giving testimony in such suit so to be brought?

2. Is it competent for such physician to testify to such exclamations and statements of the party upon examination made after suit is brought, and for the purpose of giving the same in evidence?

The plaintiff claims that such testimony is admissible, under the following authorities: *Hyatt v. Adams*, 16 Mich. 180; *Johnson v. McKee*, 27 Id. 471; *Elliott v. Van Buren*, 33 Id. 49; *Mayo v. Wright*, 63 Id. 32.

Hyatt v. Adams was an action on the case against a physician for malpractice in treating the plaintiff's wife, causing her death within four days. All there is in the opinion upon this subject is found in a single paragraph upon page 200, and reads as follows:

"The court did not err in admitting the evidence of exclamations of pain and suffering uttered by the deceased, and her complaints as to the nature of her suffering during and after the operation, though some of them were in the absence of the defendant. This is the natural and ordinary mode in which physical pain and suffering are made known to others, and the only mode by which their nature and extent can be ascertained. Such exclamations and statements are therefore original evidence. But it was, of course, open to the defendant to show, or to raise an inference, if he could, that they

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were feigned, or intended to deceive. They were clearly admissible as tending to show the malpractice of the defendant, though not for the purpose of aggravating the damages."

It will be noticed that the admission of the evidence was confined to a single fact to be proved, and that was the malpractice of the defendant; and it was expressly stated that it was not admissible for the purpose of aggravating the damages. That case is not analogous to this. The exclamations of Mrs. Jones to her physicians, made four days after the accident happened, could in no manner tend to prove that she met with a fall upon a sidewalk through the negligence of defendant. It would not be competent testimony to prove the main fact in this way from statements of the party. The only bearing it could have legitimately would be to aggravate the damages, and the case cited is authority that it is not admissible for that purpose.

Johnson v. McKee, 27 Mich. 471, was not a case of negligence, but of assault and battery. Testimony was received showing the statements by plaintiff at various times concerning his pains and bodily sufferings. These were objected to as hearsay statements, and as declarations in his own favor. It was held by the Court that,—

"So far as they were not narrations of past as well as present sufferings, it has been well settled that such statements of present feelings are facts which furnish the best, and often the only, evidence of such physical conditions as are not open to discovery by the sight or other senses of witnesses."

The question was no further considered.

Elliott v. Van Buren, 33 Mich. 49, was an action for an assault and battery, and the Court said:

"The declarations of a sick person, made from time to time, concerning present sufferings and sensations

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(not being relations of past occurrences), are the usual means of evidence where third persons testify on the subject."

Mayo v. Wright, 63 Mich. 32, was an action brought against a physician for malpractice in setting a broken leg, in which the same principle was asserted and applied.

None of these cases were actions for negligence, but the causes of action were the direct act and misfeasance of the defendant, and the testimony was admissible as bearing upon the wrongful act alleged. In each of them, also, the exclamations were at a time when motives to make testimony favorable to the party in a suit such party had brought or contemplated bringing were absent. In this case it must be borne in mind that the witnesses were employed with a view of a suit to be brought, so far as was connected with two at least of the examinations made by them, and after the suit was brought, as to the other testimony relating to her exclamations or statements of pain and suffering made to them.

In *Grand Rapids & Indiana R. R. Co. v. Huntley*, 38 Mich. 544, this Court had occasion to pass upon the competency of testimony of physicians employed as "a mere auxiliary to a lawsuit." Chief Justice CAMPBELL, in giving the opinion of the Court, said:

"It has been held several times by this Court that statements of pain and of its locality were exceptions to the rule excluding hearsay evidence. * * * These statements are admitted only upon the ground that they are the natural and ordinary accompaniments and expressions of suffering. It would be impossible in most cases to know of the existence or extent or character of pain without them. They are received, therefore, as acts, rather than declarations, and admitted from necessity. The rule which admits declarations of present suffering has never been extended so as to include declarations either of past suffering or of the causes in the past of such suffering, so as to make such statements proof of the facts. Declarations concerning the past are narra-

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tives, and not acts. Exclamations of suffering may be, and, if honest, are, parts of the occurrence itself. It is difficult to lay down any very clear line of admission or exclusion where the exclamation refers to the feelings of the moment. But we think it would not be safe to receive such testimony in any case where it is not the natural and ordinary expression of pain, called out without purpose, or in the course of medical treatment. The unstudied expressions of daily life, or the statements on which a medical adviser is expected to act, and which, if feigned, he should have skill enough to subject to some test of truth, stand on a footing which removes them in general from suspicion. But we cannot think it safe to receive such statements which are made for the very purpose of getting up testimony, and not under ordinary circumstances. The physicians here were not called in to aid or give medical treatment. The case had been relinquished long before, as requiring no further attendance. They were sent for merely to enable the plaintiff below to prove her case. The whole course of the plaintiff was taken to no other end. She had in her mind just what expressions her cause required. They were therefore made under a strong temptation to feign suffering if dishonest, and a hardly less strong tendency, if honest, to imagine or exaggerate it. The purpose of the examination removed the ordinary safeguards which furnish the only reason for receiving declarations which bear in a party's own favor.

"The general rule in regard to other classes of hearsay evidence and statements admitted upon the same principle is that they must have been made *ante litem motam*, which is interpreted to mean not merely before suit brought, but before the controversy exists upon the facts. *Stockton v. Williams*, Walk. Ch. 120, 1 Doug. 546 (citing the *Berkeley Peerage Case*, 4 Camp. 401; *Richards v. Bassett*, 10 Barn. & C. 657; *Doe d. Tilman v. Tarver*, Ryan & M. 141; *Monkton v. Attorney General*, 2 Russ. & M. 160; *Whitelocke v. Baker*, 13 Ves. 514). The language of Lord Eldon in *Whitelocke v. Baker* has met with general acquiescence. He says:

"'All are admitted upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the trute.' Page 514.

"It is not necessary to consider whether there may

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not be properly received in some cases the natural and usual expressions of pain, made under circumstances free from suspicion, even *post litem motam.* The case must at least be a very plain one which will permit this. The present controversy presents no such difficulty. The physicians were called in, not to give medical aid, but to make up medical testimony; and the declarations were made to them while engaged in that work. It would be difficult to find a case more plainly within the mischief of the excluding rule."

While we adhere to the rule permitting such testimony in proper cases, we do not feel inclined to extend it beyond the necessities of the case, nor to cases clearly within the exception noted in the Huntley case.

The fact that the physician is employed for the express purpose of giving his testimony in a case does not, for that reason alone, make him an incompetent witness; nor is his testimony incompetent for that reason. It certainly may be considered by the jury as affecting the credibility of the witness and the weight the jury should give to his testimony. But the reason why such testimony is incompetent when given by third persons, either as original or corroborative testimony, is that it is giving in evidence the *ex parte* statements of a party to a suit upon points material to the issue, and made for the purpose of being testified to and given in evidence in a suit already pending or to be brought. Such testimony is incapable of contradiction. It has all the evils of manufactured testimony, without any possible means of detecting the falsity of it. In this State a party can testify to his sensations of pain and of suffering, mental or physical, but he cannot be allowed to corroborate such testimony by witnesses employed to listen to such statements with a view to a suit to be brought or pending. In this case the plaintiff had been sworn, and detailed her condition and sufferings, and then introduced the

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two physicians employed with a view to bringing suit, to whom she had stated her condition and pains and suffering, who corroborated her by swearing to such statements. Not only this, but they were permitted to testify to what plaintiff said as to her feelings and sensations of pain after suit brought, and even during the trial of the cause. This was plainly error, as held in the case of Huntley.

Dr. Grant, upon being examined in chief, testified to her condition on the occasion of his first visit, as learned from Mrs. Jones, the plaintiff. The record shows the following to have occurred:

"*Q.* What did she represent to you as to her condition? (Objected to as incompetent, on the part of the defendant.)

"*Mr. Davis:* I think we have a right to know upon what he bases his opinion or conclusion, if he had come to any.

"*The Court:* I suppose what answer she made to the physician would be evidence as to her condition.

"*Mr. Ellis:* Take an exception.

"*A.* She stated how she had received the injury. It is not necessary to go over that any more.

"*Q.* I want to know just what she told you about it.

"*A.* She stated that she had received the injury from a fall, catching her heel in a walk going down town a few days previous, and had fallen in such a way as to severely strain the right knee-joint, so that it was doubled under her in such a way as to—

"*Q.* How did she describe this doubling under, doctor? Can you tell how that was? (Objected to as incompetent.)

"*The Court:* If she did not describe it, of course that would end it. I don't think that would be proper; what she said how she fell at that time would be proper."

This testimony should have been excluded. It was another method of corroborating the party in a material part of the case by her own statements. *Dundas v. City of Lansing*, 75 Mich. 499; *Merkle v. Bennington Tp.*, 58 Id. 156; *Roosa v. Loan Co.*, 132 Mass. 439.

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The injury in this case was alleged to have been caused by a defective cross-walk. Counsel for plaintiff asked a witness the following questions:

"*Q.* How is the walk right straight along for 80 rods this side of Dorman's residence to-day?

"*A.* It is bad.

"*Q.* Is it not true that in three or four places there are six inches of plank gone, and holes in the walk?

"*Mr. Ellis:* I object to the question, and ask to have the last answer stricken out.

"*The Court:* I am inclined to think the other party tried to get in something like that."

Then followed an offer made by Mr. Davis, and the record proceeds as follows:

"*Mr. Davis:* They did. Their offer was simply for the purpose of showing that Dr. Dillinbaugh did not know where this was; that it was somewhere in the city; his attention was not called to it. My object is to show that at this very time and at the present time these walks are in such condition that it is unsafe for aged people or infirm people to pass over them to-day,—right along this street, for upwards of 80 rods. I am perfectly willing they should go into that if they go on the ground they intended to go in to show that they are giving it that careful examination they are attempting to show. They have offered to show the safe and nice condition of things. I say they are not safe for a man that was in any way infirm, or for a lady, to go along there at night without being injured or tripped up a half dozen times there in that walk.

"*Mr. Ellis:* I object to the statements out of order, not directed to any particular walk.

"*The Court:* I don't think it is best to go into an investigation of all the sidewalks in Portland. I am a little fearful that it would be too long. Better confine ourselves to this particular cross-walk.

"*Mr. Davis:* Make it with a view of showing the general unsafe condition at that time and since. The committee on streets had had them in charge with one in question.

"*Mr. Ellis:* I object to it; object to his making it to the jury. He can't prove anything of the kind in the case. I take an exception to the offer.

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"*The Court:* We will not go into it."

The offer made by the plaintiff's counsel in the presence of the jury was improper, and directly in conflict with at least two decisions of this Court,—*Dundas v. City of Lansing*, cited above, and *Tice v. Bay City*, 78 Mich. 209. When an offer is so made in the manner this was, with the assertion on the part of the attorney that the walks "right along this street for 80 rods are not safe for a man that is in any way infirm, or for a lady, to go along there at night without being injured or tripped up half a dozen times there in that walk," and such statement and offer are objected to, and nothing is said by the court to correct such error in practice, it is reversible error. The impression which the jury must have received from the offer and statement, as well as from the testimony of the witness, which the court did not on motion strike out, was necessarily detrimental to the defendant. The court, instead of saying to the attorney that his offer was improper, and contrary to the law as laid down by this Court, and should not have been made in that manner and with the assertion of fact by the attorney, and instead of cautioning the jury not to be influenced by it, merely said:

"I don't think it is best to go into an investigation of all the sidewalks in Portland. I am a little fearful it would be too long. Better confine ourselves to this particular cross-walk."

And again, "We will not go into it." It left the jury to infer that, if it had been gone into, the assertion made by the attorney would have been substantiated by other testimony; and the attorney got before the jury the same effect of this immaterial testimony as if it had actually been introduced.

Objection is made to a question asked Dr. Grant as an

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expert witness. The record shows the following to have occurred:

"*Q.* Doctor, I want to ask you this question: Now, suppose a woman 48 years old, free at the time from rheumatism, and in good health, one year previous having had a severe illness known as 'malarial fever,' and which confined her to the house for some 13 week; and some six or seven years prior to that time having had some sickness of the lungs,—lung difficulty; and in 1864, while in a hospital in the South, had the small-pox; not having menstruated for about one year; never had any difficulty with her back, except what she terms 'back-ache,' brought on at monthly periods;—

"*The Court:* Leave out 'brought on,'—that she had back-ache at the time of monthly periods.

"Her uterine organs never having troubled her; never having had any trouble with her hip or the small of her back, except the back-aches spoken of, at the time spoken of; but three years previous had injured her left knee, by striking it against a stick of stove-wood, while putting it into the stove, to that extent that the injury terminated in what is known as 'dropsy of the knee,' and for which she wore a rubber knee cap until about three months previous to July 20, 1888, from which time until the 20th of July the said left knee was apparently as well as ever; and that about one year previous to July 20, 1888, she knelt upon the damp ground for about one-half hour, and upon her right knee; and that as a consequence she found swollen condition; but that upon application of iodine she found the next morning—

"*The Court:* Change that 'as a consequence,'—that it was followed by that; after kneeling down there it was followed by swollen condition:

"That after kneeling down it was followed by swollen condition; that upon the application of iodine the next morning she found that the knee was apparently as well as ever; that about three or five months previous to July 20, 1888, she again knelt down upon the ground and upon her right knee, and it again appeared to be swollen and slightly painful, and continued for a period of about six weeks; that she then applied, during this time, iodine, and after three months—but for three months prior to 20th of July, 1888, she had no trouble with said knee, that is, the right knee; the same appeared to be well, to-

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have entirely recovered from the difficulty; having no tenderness of the muscles through the small of the back or the lumbar regions, or pain or tenderness of the genital organs, no ecchymosed condition of the tuberosity of the *ischium*, no pain or inflammation in the sacro iliac joint or the muscles covering the same—should catch her left heel in a hole in the cross-walk, and, for the purpose of protecting herself, throwing her right foot back, and doubling her right foot under her right leg, and fall in that position upon the left hip and side, becoming unconscious, or nearly so, by reason of the suddenness of the fall, her left foot becoming loose in the mean time, and upon getting up she walked a distance of about 1,150 feet in going home, with great difficulty, being obliged to go from side to side, suffering great pain in the groin, extending to the front of the body, with pain in the back, and upon reaching home obliged to go to bed, and the next day after such accident suffering great pain in her left groin, back, and front of her body, suffering intensely while lying on her left side, being unable to lie on her right side on account of pain in her right knee, being obliged to lie on her back, and in a position to have a pillow under her right knee, suffering pain in her left heel; also with a pain in the back of her neck, or drawing in back of her neck, so that she had to have a pillow under it to keep her head from going forward; that five days afterwards you find upon examination the right knee in a semi-flexed condition, and upon comparison with the left knee you find that the right knee is about an inch larger than the left at certain points, and where resistance is least you find a puffiness at the side of the *patella*, also fullness or prominence above the knee, and the joint very tender, especially when you attempt to extend it; finding no contusions or bruises on the surface whatever, and skin apparently normal; left knee being in apparently a normal condition; finding upon the left hip, a little outside the tuberosity of the *ischium*, ecchymosed condition; finding no dislocation of knee-joint or no fracture; more bruising of the tissue there upon upper part of hip-joint; near sacro iliac joint, or the muscles covering the same, you find tenderness, with no bruises. Passing to the lumbar region, you run your finger over the occipital bone from the upper part of the spinal column all the way down, and find tenderness on

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the left side of the spine in the lumbar region, and the patient complaining of extreme pain when attempt is made to put the muscles in action; upon pressure, finding over the pubic and left groin very much tenderness and pain complained of by patient; also in neighborhood of pubic bone. Upon digital examination of *vagina*, you find, upon placing your finger upon the neck of *uterus*, extreme pain is complained of by patient; attempting to impinge ovary, you find that this manipulation causes so much pain that the patient was unable to bear it, according to her statements; and coming to the conclusion that the trouble was with the left ovary and congested state of the womb, the temperature being 99, heart irritable, pulsation 96, bladder irritable, left ovary very tender upon pressure. Upon your second examination, which was on the 11th day of August, 1888, you find that the swelling in the knee has been reduced to one-half inch less, pain and tenderness in the muscles of the neck, in genital organs, and patient unable to bear her weight upon her right foot. Upon third examination, which occurred about the 18th of September, you find same symptoms, with slight modification in the reduction of swelling and the lessening of pain and tenderness in the right knee and muscles. Upon fourth examination, which occurs upon 17th day of October, you find her still unable to extend her right knee, with slight modification of pain and tenderness in the right knee, hip, and genital organs. Upon fifth examination, made night before last, you find contraction of the external and internal tendons, 16 months' time having elapsed from date of first examination to that of last,—what would you say as to probability of absolute recovery of patient from all these conditions which you found her in at the time of your first examination?

"*Mr. Ellis:* Objected to. The trouble with the question is that without describing it, same condition, you find tenderness; you find tenderness there,—different parts.

"*The Court:* Where it states that you find tenderness upon the examination, that may be changed,—that the patient complains of tenderness and pain, complains of tenderness at those points.

"*Mr. Ellis:* Also that he assumes—the question does—that the left knee was in normal condition.

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"*The Court:* At what time?

"*Mr. Ellis:* At the time of the examination by the doctors.

"*The Court:* The first one?

"*Mr. Ellis:* Yes, sir.

"*The Court:* There is some evidence by the doctor, certainly, that he found it in normal condition at that time. Then there is some evidence to base it upon.

"*Mr. Nichols:* This doctor himself says it was.

"*Mr. Ellis:* The other doctor said it was not. Also, at the time of the third examination, the patient was unable to bear her weight upon her right limb. There is not any evidence of that kind.

"*Mr. Nichols:* I said the second examination. I don't say the third.

"*The Court:* Well, change that,—that the patient saying that she was unable at that time, at the time of that examination, to bear her weight upon the limb. Anything further?

"*Mr. Ellis:* I object further to the question that it is so long, and contains so many disputed propositions; also contains a decision or determination that the doctor made at the time of the examination.

"*The Court:* What decision do you refer to?

"*Mr. Ellis:* Concerning the cause of the trouble of the internal organs at that time; so much so that he decided so and so at the time. There is not any evidence that this doctor decided that.

"*The Court:* There is evidence that this doctor decided something about the knee.

"*Mr. Ellis:* Oh, yes, but nothing about the genital troubles.

"*The Court:* What do you say in your question about decision as to genital organs?

"*Mr. Nichols:* Extreme pain in attempting to impinge ovary between your fingers. This manipulation she was unable to bear; coming to the conclusion that the trouble was with the left ovary. Dr. Logan swears to that.

"*The Court:* There is something to base that upon,—that is, in the opinion of one physician who examined it. Now, anything further?

"*The Court:* I guess I will let him answer. (Exception for the defense.)

"*The Court:* If you want anything added to, add to it.

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"*Mr. Ellis:* I haven't any requests to make. It is in the same condition that it was before.

"*The Court:* Our Supreme Court has decided as to those questions. When the court asks counsel to point out defects it is their duty to do so.

"*Mr. Ellis:* There was the condition about this excessive flowing afterwards.

"*Mr. Nichols:* I will add, then, that some seven days afterwards—

"*Mr. Ellis:* Also doesn't contain medicine that the woman had been taking during that time.

"*Mr. Nichols:* Five days after the injury complained of by the patient—after the 20th—menstruation commences again, and continues for some time excessively, then ceases for a short time, and then again commences, and continues for the period of eight weeks without cessation, in excessive degree.

"*The Court:* Did you state about her having lung trouble?

"*Mr. Nichols:* Yes, sir.

"*The Court:* She had lung trouble some six or seven years ago, and coughed considerably.

"*Mr. Ellis:* It doesn't state what was taken, or what had been done with the patient, or the care she had had, or the place of these examinations, or where she had traveled to make these examinations from time to time, nor the medicine or care that she had had during that time. It seems to me that would be necessary, so that you could tell whether they were permanent or not. Whether she had run along without any care, what it was, the medicine that was given her, would be material.

"*The Court:* Well, based simply upon what is included in the question, you may answer it, doctor. (Exception for the defense.)

"*A.* You want to know as to my opinion of the permanency of all these disabilities mentioned?

"*Q.* Yes, sir.

"*A.* Well, I have to exclude everything except the disability to the knee-joints.

"*Q.* Very well then, what can you say about that?

"*A.* As I believe, the others are not permanent. I think I answered the same question this forenoon,—that I believe the injury or the disability to the knee-joint was permanent."

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In *Mayo v. Wright*, 63 Mich. 32, we held that it was no objection to a question asked an expert witness that it was too lengthy; but we also held that it should be reduced to writing, and embrace the whole question in a connected manner. We think this question is open to the criticism made upon it in so far as relates to the disconnected method of propounding it. It undoubtedly contains, however, the elements of what the plaintiff bases her right to recover on for the injury caused by the negligence of the defendant, which, upon examination of the question, turns out to be more in the aggravation of existing ills than any definite new injury caused to plaintiff.

Following the expert question above referred to, the following was asked of this witness:

"*Q.* Taking into consideration simply these things that were asked you on this question, to what would you attribute the condition that you found the patient in at the time of your examination?"

This was objected to as incompetent.

"*The Court:* I am inclined to think that is proper. Leaving out now everything except what was stated to you in this hypothetical question, then what, in your judgment, caused the condition in which you found her?

"*A.* As to the cause?

"*Q.* Yes.

"*A.* Why, it seems to me there could be but one conclusion, knowing the history of the case and all,—that it resulted from the fall. It doesn't take a medical expert to answer that question, does it?"

This was improper. It was usurping the province of the jury. The witness was permitted to testify to a conclusion, contrary to our own decisions. *Dundas v. City of Lansing*, 75 Mich. 499; *Tice v. Bay City*, 78 Id. 209.

The judgment must be reversed, and a new trial granted.

The other Justices concurred.

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CATHERINE M. SPEIRS v. HENRY C. WISNER.

[See 70 Mich. 271; 74 Id. 143.]

Executors and administrators—Commissions—Accounting—Equity jurisdiction.

1. Equity has jurisdiction of a suit by one executor against his co-executor, who has received all of the statutory commissions, for an accounting and division of such commissions.
2. There is no rule of law or equity which declares that co-executors, without regard to the time spent, responsibility assumed, or services rendered, are entitled to an equal *pro rata* share of the statutory fees.
3. One of three executors, who managed the business and had the responsibility of administering the estate, received the statutory commissions. One of his co-executors resided in another state, and the other, the widow, who was absent much of the time during the settlement of the estate, obtained an assignment from the non-resident executor of his claim to such commissions, and filed a bill to compel the managing executor to pay her two-thirds of the commissions he had received, which is dismissed, the Court holding that, under the facts of the case, complainant is not entitled to the relief prayed for.

Appeal from Wayne. (Reilly, J.) Argued October 15, 1891. Decided December 21, 1891.

Bill by an executrix for an accounting and division of statutory commissions. Complainant appeals. Decree affirmed. The facts are stated in the opinion.

Moore & Moore, for complainant, contended:

1. Equity has jurisdiction; citing Williams, Ex'rs, 1911; Story, Eq. Jur. § 466; Schouler, Ex'rs, §§ 403–405; *Huff v. Thrash*, 75 Va. 546; *Marsh v. Harrington*, 18 Vt. 150; *Conner v. McIlvaine*, 4 Del. Ch. 80.
2. An agreement between co-executors that one of them alone shall manage the estate is void as against public policy; citing Schouler, Ex'rs, § 404. This is a sound rule of law. An execu-

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tor should either act or resign. Public policy will not allow him to turn over the business and responsibility to another. We think our statute intends that the commissions shall be divided equally, and, if one executor performs extraordinary services, he shall be paid for the same.

H. C. Wisner, in *pro. per.*, contended:

1. How. Stat. § 5959, gives the executor commissions upon the personal estate collected and accounted for by him, and the jurisdiction given the probate court to pass upon the accounts of executors is complete; citing How. Stat. §§ 5949, 5957, 5958; *Holbrook v. Campau*, 22 Mich. 288; *Hall v. Grovier*, 25 Id. 428; and, as to the remaining questions involved, contended for the doctrine of the opinion.

CHAMPLIN, C. J. Mr. Wisner, Mr. Kleinhans, and Mrs. Speirs were co-executors of Mr. Mabley's will, filing a joint bond in the penal sum of $1,000.

Mr. Wisner filed two accounts, showing that he had received from the estate and retained all the commissions allowed by the statute, and asking for a further allowance for extraordinary services rendered. All these accounts were contested by the estate, Mrs. Speirs objecting to the amount claimed for extraordinary services, and claiming that Mr. Wisner was entitled to only one-third of the commissions. Each of these suits was carried to this Court. *Wisner v. Mabley's Estate,* 70 Mich. 285; 74 Id. 143. This Court fixed his allowances for extraordinary services, but held that, as between Mr. Wisner and his co-executors, any executor could collect all the commissions, and their distribution could only be determined by a suit between themselves. After this decision Mr. Kleinhans assigned his claim to the commissions to Mrs. Speirs, and she files a bill of complaint for an accounting, claiming two-thirds of the commissions, being the shares of the two executors.

We think equity had jurisdiction over the subject-matter, and is competent to afford relief.

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The only question we have is, in view of the whole history of the case, is the complainant entitled to the decree prayed for? It appears very clearly that Mr. Wisner was the executor who managed the business, and who had the responsibility of administering the estate. It is true that he consulted with his co-trustees from time to time, as was proper for him to do, and to keep them advised of the situation. We cannot lose sight of the fact, however, that these fees were allowed to defendant, Wisner, by the probate court, against the strenuous objections of complainant, as being justly due to him as a part of his compensation, although the fact of such allowance is not binding upon the conscience of this Court. One of the co-executors, Mr. Kleinhans, did not reside in this State, and the complainant was absent from the city much of the time during which the estate was in process of settlement. It strikes us as manifestly unjust that complainant should, by obtaining an assignment from a non-resident executor, demand two-thirds of the statutory fees allowed for administration. There is no rule of law or equity which declares that co-executors, without regard to the time spent, responsibility assumed, or service rendered, are entitled to an equal *pro rata* share of the statutory fees. Neither Mrs. Speirs nor Mr. Kleinhans have made or filed a report of their doings as executors in the probate court, and never joined their co-executor in so doing.

Considering all the facts, and weighing all the equities, we do not think that the complainant is equitably entitled to two-thirds of the statutory fees awarded and allowed by the probate court to the defendant, and her bill of complaint should be dismissed, with costs.

The other Justices concurred.

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CELIA CRONENWAITE v. FERDINAND HOFFMAN ET AL.

Highways—Encroachment—Trespass.

In an action of trespass against a commissioner of highways for removing a fence which he claimed was an encroachment upon a regularly laid section-line highway, and so described it in the order for removal, the commissioner can only justify by showing that the highway is located upon the section line, and a contrary finding by the jury entitles the plaintiff to a verdict.

Error to Monroe. (Kinne, J.) Submitted on briefs November 20, 1891. Decided December 21, 1891.

Trespass. Defendants bring error. Affirmed. The facts are stated in the opinion.

Charles A. Golden and *George M. Landon*, for appellants.

Ira G. Humphrey, for plaintiff.

CHAMPLIN, C. J. This is an action of trespass upon lands described as the N. W. ¼ of the N. W. ¼ of section 15, town 5 S., range 8 E.

The suit was commenced in justice's court, and removed to the circuit court under a plea of title, to wit: That the *locus in quo* was a public highway, and that defendant Hoffman was the commissioner of highways, and that he did the act complained of as such commissioner in removing the encroachment upon the highway, and the other defendants were his assistants, and acting at his request and by his authority as such commissioner.

Upon the trial in the circuit court the plaintiff gave in evidence a deed of the premises to her, dated June

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2, 1883, and showed possession under it. The damage consisted in taking down a rail fence and throwing it back southward upon plaintiff's land some eight feet.

The defendants introduced testimony, which was not controverted, showing that on the 18th day of June, 1870, the commissioners of highways duly laid out a public highway on the section line between sections 10 and 15, taking from the lands now owned by plaintiff a strip two rods in width, and at that time the land now owned by plaintiff, adjoining this highway so laid out, was timbered land, and uninclosed; that in the spring of the year 1871 the highway commissioners opened such highway, and from that time to April, 1888, the public and township authorities had worked, improved, and traveled such highway on the section line continuously, claiming two rods south from such section line between sections 10 and 15. Plaintiff built the fence in dispute in April, 1888, and it was claimed that this was an encroachment upon the highway; and the defendant Hoffman, as such commissioner, ascertained the extent of such encroachment, and on the 29th day of October, 1888, as he testifies, served upon the plaintiff an order, of which the following is a copy, and filed proof of such service in his office:

"COUNTY OF MONROE, }
Township of Exeter. }

"The undersigned, commissioner of highways of the township of Exeter, county of Monroe, having ascertained that the public highway in said township running east and west on section line between sections 10 and 15 is encroached upon the south side thereof along the lands in the occupation of Daniel Cronenwaite by a rail fence, erected by the present occupant of the same, and having ascertained the bounds and limits thereof to be upon and according to following line, namely: Beginning at a point in the east line of N. W. quarter of N. W. quarter of section 15 of Exeter, Monroe county, 18½ links south

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of the north line of said section, said section line being the center of an old traveled highway between sections 10 and 15; thence running south 31½ links (this being the point of greatest encroachment); thence westerly, parallel to the said section line, to the highway on the west side of said description; thence north 4 links; and thence easterly to the place of beginning,—and having ascertained that all that narrow strip or parcel of land which lies inside said fence, or all that strip of land inside said fence and between said fence and the line of said highway, is a part of said highway, it is therefore ordered by me, the said commissioner of highways, that within 30 days after service of this order said fence be removed so that the said highway shall be opened and unobstructed, and of the width originally intended, which was 4 rods.

"Given under my hand this 29th day of October, A. D. 1888.

"FERDINAND HOFFMAN,
"Commissioner of Highways."

"To Mrs. Celia Cronenwaite: Take notice that an order, a copy of which is herewith served upon you, has been made by me, and you are required, according to the statute in such case made and provided, to remove the rail fence therein mentioned within 30 days after service upon you of a copy of said order.

"Dated the 29th day of October, A. D. 1888.

"FERDINAND HOFFMAN,
"Commissioner of Highways."

No notice was taken of the order by plaintiff, and in March, 1889, the commissioner proceeded to remove the fence, which is the trespass complained of. On the trial it became a question, upon which testimony was offered by both parties, as to the location upon the ground of the section line between sections 10 and 15; and, if such line was in fact where the plaintiff contended, she had not encroached upon the highway, but, if it was in fact where the defendants contended, then she had encroached upon it.

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The only assignments of error alleged relate to the charge of the court as given, and to his refusals to charge. The court charged the jury, after instructing them as to the rules which should be observed in retracing section lines, as follows:

"If you find that the survey as made by Baldwin is correct, then the fence of the plaintiff was an illegal encroachment, and the defendants will be justified in removing it, for it was not disputed but that, according to his survey, it was within the highway. But, if you are satisfied that the survey of Mr. Bartlett is correct, then there are other questions which arise in this case."

No exception is taken to this portion of his charge. The errors relied upon relate to his instructions and his refusal to instruct with reference to highways by user. It is not necessary to examine or pass upon the errors alleged upon this branch of the case, for the reason that, if erroneous, they were not prejudicial to the defendants. The defendants could only justify upon the ground that the highway was upon the section line which had been accepted by the proper authorities of the township. How. Stat. § 1315. The order and notice to plaintiff were based exclusively upon such highway on the section line, and not upon a highway by user on a different location than a section line. The order does not recite that the highway is a highway by user, describing the center line thereof; nor is it otherwise described than as a highway located upon the section line. The defendants had no right to interfere with the plaintiff's possession unless to remove such an encroachment as the commissioner had declared and ordered plaintiff to remove. Inasmuch as the jury must, under the instruction of the court, have found that the section line was not located where it was claimed to be by the defendants, the verdict must necessarily have been in favor of the plaintiff, and

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we ought not to reverse the judgment in order that the parties may try an immaterial issue.

The judgment is affirmed.

The other Justices concurred.

JOSEPH J. SHEARER v. EDWARD MIDDLETON.

Pleading—Amendment of declaration—Overflowing lands—Evidence—Adverse possession.

1. Where in a flowage case the cause of action set forth in the declaration is the maintenance of a dam and the consequent obstruction of the flow of the waters of a stream, which are thereby set back and made to overflow plaintiff's land, an amendment alleging that the water upon plaintiff's land, which is low and wet, is held back and kept on the land by reason of the maintenance of said dam, to the injury of the land, does not introduce a new cause of action, but alleges an additional injury from the same cause, and is properly allowed, after the close of the testimony, to cover the proofs in the case.

2. In order to show that the defendant had raised his dam, and thereby increased the flowage upon plaintiff's land to its injury, the plaintiff was permitted to show the relative capacity of a grist-mill operated by the defendant prior to said increased flowage, the grinding in which was done with stones, and of a roller-mill erected by the defendant 300 or 400 feet below the old mill, under the claim that the jury might infer that the increased capacity of the new mill was obtained by raising the dam. No proof was made that the defendant had used his full power when operating the old mill, and it appeared that he only owned one-half of the water-power created by the dam at that time, and had since then acquired the entire power, which was used in running the new mill; nor was it shown that the same wheels and machinery were in use, nor that it would require a greater head of water to run the roller-mill, nor that defendant had not acquired a greater head standing in the same level of the pond by locating the new mill further

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down the stream. And it is held that, in the absence of the necessary *data* raising the conclusion that the dam was necessarily raised when the capacity of the mill was increased, the evidence first referred to was misleading and entirely unreliable, and should not have been admitted for the purpose claimed.

3. There are many ways in which an adverse holding of land may be interrupted other than by bringing suit; citing *Perkins v. Blood*, 36 Vt. 273; *Armstrong v. Morrill*, 14 Wall. 120; *Byrne v. Lowry*, 19 Ga. 27; *Borel v. Rollins*, 30 Cal. 408; *Warren v. Putnam*, 63 Wis. 410; *Gage v. Gage*, 30 N. H. 420; *Burrows v. Gallup*, 32 Conn. 493; *Brickett v. Spofford*, 14 Gray, 514.

4. The actual, continued, visible, notorious, and hostile possession of land is tantamount to a claim of ownership.

5. Certain of defendant's requests to charge are held to have been covered by the general charge of the court.

Error to Montcalm. (Smith, J.) Argued November 20, 1891. Decided December 21, 1891.

Case. Defendant brings error. Reversed. The facts are stated in the opinion.

Ellsworth & Barden and *John Lewis*, for appellant.

W. E. Hoyt, for plaintiff.

CHAMPLIN, C. J. In this case it is claimed by the plaintiff and conceded by the defendant that the plaintiff has been the legal owner of the lands described in the declaration for more than 15 years last past, and that he is still the legal owner of said lands.

It is claimed on the part of the defendant that he has acquired the right to flow such lands by prescription, by flowing the same in the same manner and to the same extent for more than 30 years last past; that immediately prior to the commencement of this suit the defendant had occupied the lands by flowage for more than 15 years openly, adversely, peaceably, uninterruptedly, and hostilely, and thereby acquired a good and

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legal title to so much thereof as he occupied at the time of the commencement of the suit.

The plaintiff claims that within the 15 years immediately prior to the commencement of the suit the defendant raised the water at his dam, and flowed more of said lands than formerly; and the real issue on the trial was whether the defendant had raised the head of water at his dam below said lands, and thereby increased the flowage of water over the lands of the plaintiff, within 15 years immediately prior to the commencement of the suit.

After the testimony was closed, and after the plaintiff's attorney had made his opening argument to the jury, and after Mr. Lewis, on behalf of the defendant, had made his argument to the jury, Mr. Ellsworth, of counsel for the defendant, moved the court for a verdict for the defendant, because the declaration only alleged that the waters of Flat river were forced back on the plaintiff's lands, and claimed the evidence showed that the waters of Flat river were not forced back there; which motion was overruled by the court, to which ruling the defendant excepted. The court then permitted the counsel for plaintiff to amend his declaration so that it would allege, in addition to the allegations therein contained, that the water upon the lands of the plaintiff is held back and kept there by reason of the maintenance of the dam of the defendant, and his land injured thereby; to which ruling the counsel for defendant excepted.

The original declaration alleges, after setting up the maintaining of the dam across the Flat river, that "by means thereof the said defendant hath, ever since the 14th day of February, A. D. 1882, obstructed and stopped the natural course of the water of the said stream, and thereby hath caused the water of the said stream to

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overflow and drown the plaintiff's meadow and arable lands." The amendment was allowed to cover the facts in proof that the land of plaintiff was low and wet, and that water from said land was drained into Flat river before the dam was raised, and that the effect of such raising of the dam was to hold this water back, and to prevent it from running off. It was an incident of the wrong complained of in the original declaration,—that is, the obstructing of the waters of Flat river by the dam. It was not the introduction of a new cause of action. The cause of action was the maintaining of a dam and obstructing the flow of the waters of Flat river, and causing them to set back, to plaintiff's injury. The amendment alleged an additional injury from the same cause. The assignment of error based upon this ruling of the court is overruled.

The court permitted the plaintiff to introduce testimony which tended to show that the mill-dam was erected, and the waters of flat river ponded thereby, for the purpose, among other things, of operating a grist-mill owned by defendant, and that the dam had been maintained at that point for milling purposes for more than 20 years. It was an undisputed fact that during all the time the dam had been erected it had set back and ponded the water upon the premises of plaintiff, and upon premises further back from the river than his; but the plaintiff claimed, and introduced testimony tending to show, that within fifteen years last past the water had been raised by the defendant and set back over the land of the plaintiff to a greater extent than formerly. It appears that the mill operated by defendant down to 1871, which was more than 15 years before the commencement of the suit, was a grist-mill, in which stones were used to grind the wheat and other grain. That year he built a new mill, from 300 to 400 feet further

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down the river than the other mill, and nearly 50 rods distant from the dam, and dug a race from the same bank to the new mill, and then put in rollers to manufacture flour for market, increasing the capacity of his mill, from time to time, by the addition of new rollers. The plaintiff did not prove any direct act of defendant in adding to the height of his dam, but sought to establish that fact by proving that the water overflowed his land to a greater extent than formerly; and he testified that such increased overflow had occurred within 10 years before the suit brought. For the purpose of proving that the defendant had raised the height of his dam he was permitted to introduce testimony, against defendant's objection, to show what the capacity of defendant's grist-mill was when he was grinding with stone, and also what it is with rollers, and claimed that the jury would be authorized to draw an inference from such increase of capacity that defendant obtained such increase of capacity by raising his dam and so increasing his water-power. The plaintiff did not show that the defendant had used his full power when grinding with stone,—indeed, it appeared that at that time he owned only one-half of the water power created by the dam, and that he has since acquired the whole power created thereby; nor did he show that the same wheels were in use, nor the same machinery, nor that it would require a greater head to run his roller-mills than it did when using stone, nor that he had not acquired a greater head of water standing in the same level of the pond by moving his mill further down the river. It is plain that such testimony, without supplying all the necessary *data* by which the conclusion could be reached that the dam was necessarily raised when he increased the capacity, was misleading, and

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entirely unreliable, and should not have been submitted for the purpose claimed.

Henry M. Calkins was a witness whom plaintiff had produced to establish the fact of water having been raised so as to overflow more of plaintiff's land than formerly. Calkins was a surveyor, and testified when first called to the stand, that he had made surveys of the premises, and produced a map which he had made, and which was introduced in evidence. He also testified that he had a high-water mark at the flume when defendant had a full head of water, and also a corresponding mark at a bridge which was on or near the plaintiff's land; and in this way he could tell when the water was drawn down in the pond.

A witness introduced by defendant, who worked for him in his old mill from 1861 to 1864, testified in chief to the high-water mark in the flume at that time, and said he could not see that it is maintained any higher than it was then. On cross-examination by plaintiff's counsel he was interrogated as to the numer of feet head, and said that sometimes they had eight feet head and sometimes a little more, but the ordinary high-water mark was eight feet; and he did not know how many feet head they had now. The defendant introduced no testimony to show what head they had at the old mill, nor at the new mill.

After the defendant had introduced his testimony and rested, the plaintiff recalled the witness Calkins, and proposed to show what measurements he had made at the Middleton dam, with reference to determining the head of water. This was objected to by defendant's counsel, and the record then shows as follows:

"*The Court:* Why wasn't that a part of your case, Mr. Hoyt?

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"*Mr. Hoyt:* We claim we made our case when we showed that the water had been flowing upon our land, that the water had been raised in the pond above the dam, and that Middleton was maintaining a dam now. They met that case by undertaking to show that, if the water had been raised upon this dam, it was no fault of theirs, because this dam had not been raised; and they bring different witnesses here—innumerable witnesses here—to show that the dam had not been raised, that the water had not been raised above the dam, in all these years Middleton had owned it; and Mr. Charles Middleton and these other men that have worked about the mill all testify that the dam had not been raised. We propose to show that within the last 15 years, at some time, they have raised the dam.

"*The Court:* When? About what time?

"*Mr. Hoyt:* Since the time that miller worked there from Mt. Pleasant.

"*The Court:* You know something about it, do you, or don't you?

"*Mr. Hoyt:* It has been raised gradually. It has not been raised all at one time. We can't show that. We can't show that Mr. Middleton commenced at some time in the spring of 1875, or any other spring, and kept to work on that dam until he got it maintained any higher than it was before; but we do expect to show that gradually this dam had been raised, until now he is carrying something like two feet greater head than he was at any time before.

"*The Court:* Do you expect to show how that the head had to be raised so as to flow the water back more than it did before within the last 15 years?

"*Mr. Hoyt:* That would be the only conclusion that any man could arrive at if the water had been raised two feet.

"*The Court:* Will you answer my question; do you expect to show that?

"*Mr. Hoyt:* We expect to show that.

"*The Court:* That answers my question. I am inclined to let you show it if you can."

The witness then testified that he had made measurements in July and since as to the head. He was then asked:

"*Q.* You have those measurements. How much head do you say they have?

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"*A.* I don't understand the technical definition of the word 'head,' as millers use it, but I found a difference of ten feet and two inches between the ordinary high water in the pond and the water immediately below the dam, when they were running the mill. I know the slash-boards at the head of the chute; the difference in height between where they formerly stood and where they stand now is about two inches,—one inch to an inch and a half lower."

This testimony was not in any sense rebuttal. No witness of defendant had testified as to the height of the dam, or to the difference in level in the surface of the water above the dam and immediately below. Besides, such testimony did not tend to show that the head of water had been increased by raising the dam. The witness did not seem to know what is meant by the word "head," as applied to water-power in moving water-wheels. I had supposed that it is a matter of common knowledge that the signification of the term when water is applied to such use is the vertical distance between the water in a flume or place from whence it is drawn to the tail-water of the wheel by which the power is communicated to the machinery; and, unless it was shown that the water at the bottom of the dam is on the same level as the tail-water of the wheel, it would afford no evidence of the "head." If the tendency of such testimony was to prove that the height of the dam had been increased gradually for several years, it was testimony which should have been introduced by plaintiff in the first instance in support of his issue. This witness was placed upon the stand by plaintiff to support the issue upon his part, and it is not claimed that counsel for plaintiff did not know of facts he could prove by the witness at that time, or that it had escaped his memory, or that he had failed to call out the facts through inadvertence. Such testimony was not only not rebutting, but it was misleading.

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The court erred in striking out the testimony of Jerome Lufkin, wherein he testified that he had land adjoining the plaintiff's and that the water from defendant's pond set back onto his lands, and that timber grew there in the water,—some quite small trees, and some quite large trees,—and that some trees are growing there now like the tree brought into court by the plaintiff. The plaintiff had introduced in evidence by the witness McIntyre a stub of a small tree which had grown on plaintiff's land, now covered with water, for the purpose of establishing the fact, based upon his theory that timber could not grow in water, that therefore the water must have been raised upon plaintiff's land by defendant's dam after the tree had grown, some 10 or 15 years previous. The testimony of this witness for defendant was offered to dispel the theory of plaintiff by showing that like timber in size and quality was growing on the witness' land, all the time covered with water, and land, too, adjoining the land of the plaintiff. The testimony should have been admitted upon the same theory as the plaintiff's testimony was, as showing the effect of water upon the standing timber.

Error is assigned for the reason that the circuit judge did not give the third request of the defendant's counsel, which reads as follows:

"I also charge you that, when adverse, open, peaceable, and notorious possession of land has once commenced, under our statute of limitations nothing less than suit would interrupt the right or prevent such occupancy from ripening into a perfect title to the same after the lapse of 15 years, provided such adverse, open, peaceable, and notorious occupancy has continued uninterruptedly for that space of time, since 1863."

The fault with this request is that it confines the interruption of an adverse holding to the bringing of an action, whereas there are many ways in which such

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adverse holding may be interrupted other than by bringing suit. See *Perkins v. Blood*, 36 Vt. 273; *Armstrong v. Morrill*, 14 Wall. 120; *Byrne v. Lowry*, 19 Ga. 27; *Borel v. Rollins*, 30 Cal. 408; *Warren v. Putnam*, 63 Wis. 410 (24 N. W. Rep. 58); *Gage v. Gage*, 30 N. H. 420; *Burrows v. Gallup*, 32 Conn. 493; *Brickett v. Spofford*, 14 Gray, 514.

Error is also assigned for not giving defendant's tenth request, as follows:

"I further charge you as matter of law that the height of defendant's dam, and the height to which he has usually kept the water raised in said dam, for 15 years prior to the commencement of this suit, fixes and establishes his right to flow the lands of the plaintiff as thus flowed, if so flowed at all; and if the defendant has, during any period of 15 years, since the year 1863, kept the water at his dam usually as he did at about the commencement of this suit, then the plaintiff has no cause for complaint under the laws of the State, and you should find a verdict for the defendant."

We think this request is covered by the following instructions given by the court to the jury:

"If you conclude from the evidence in the case that the plaintiff has shown that his land has been flowed because of the maintenance of this dam, then the plaintiff is entitled to recover his actual damages running back six years before the commencement of this suit, unless the defendant has acquired right to use the land as he is using it because of his long continued possession—actual, open, adverse, and uninterrupted use or possession—of the same. Now, in order to acquire prescription, it is not necessary that a man have the paper title of it before commencing to use it. Our own Court uses this language: 'Our statute does not require adverse possession to be based on color of title.' It requires only that it shall continue for the requisite time after the right of action accrues against the possessor. It may become perfect therein, though in its origin the possessor has no shadow of title. In such cases it must be made clear that the real owner has been given a cause of action.

"The basis of acquiring a title by prescription is that

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one man goes on the land of another, or uses it in some way as owner, claiming it as his own, uses it adversely, in hostility to the rights of the other, openly, adversely, uninterruptedly, and peaceably for the required time under the statute, and the other party acquiesces in that; if he has a right of action, and fails to bring it for this required time, then the law steps in and says that 'you can't dispute the question. He has got the land. It is his just the same as though he had a grant, if that is true.' So the second question is, has the defendant actually, adversely, peaceably, openly, and uninterruptedly had possession of this land, or flowed the same, so that now the plaintiff has no cause of action? * * *

"I say to you, gentlemen of the jury, that 15 years adverse, open, peaceable, notorious, hostile, and uninterrupted possession of land by flowage gives to the person so flowing the land a right to flow the same, and a right so acquired is, under our statute, equally as good as if done by authority. I further instruct you that such possession of land by flowing, there not being any color of title, not under any deed or any other paper title,—that possession which is adverse, open, visible, notorious, and uninterrupted for the period required by the statute,—is all that is necessary to make complete defense for the defendant in this case."

Defendant's thirteenth request is in the following language:

"I also charge you that, if you find that the defendant has caused the waters of Flat river to overflow the lands of the plaintiff, and also find that he (defendant) has not so flowed said lands for 15 years continuously after 1863, and before the commencement of this suit, even then you cannot guess at the damage sustained by the plaintiff at such flowage, and could only render a verdict for damages for such an amount as was actually proven, and you have no right to base a verdict on a presumption or guess."

This request is sufficiently covered by the instruction of the court as follows:

"Now, gentlemen, if under these instructions you conclude that the plaintiff should recover, then comes the question as to what should be the damages. You could

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only go back for the period of six years prior to the commencement of suit, and the suit was begun in February, 1888. And that measure of damages would be, how much damage that would be,—the rental value of the land that he has been deprived of. Where he was only partially deprived of it, then the extent of the injury that he has sustained, that would be the measure of damages that he should recover, if he recovers at all. And so all the evidence bearing upon that point would be proper for you to consider, what the witnesses tell you the use of the land is worth, and the extent—how much—it has been injured."

A criticism is made upon the language of the court in his instruction defining adverse possession, wherein he says, "claiming it as his own." This was not error. The same idea is embraced in the term "hostile and exclusive," as applied to possession. The actual, continued, visible, notorious, and hostile possession is tantamount to a claim of ownership; and in this case, if defendant had raised the water by his dam so as to overflow plaintiff's land continuously for 15 years, as claimed by the defendant, without objection from the plaintiff, it would be sufficient notice to plaintiff, not only that he so held it hostilely, but under a claim of ownership, for it could not be otherwise than visible, notorious, and hostile as against the plaintiff.

For errors in the admission of testimony the judgment must be reversed, and a new trial had.

The other Justices concurred.

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A. SCHUYLER MONTGOMERY ET AL. v. THE MUSKEGON BOOMING COMPANY.

Negligence—Setting fires—Operation of steam craft—Pleading.

1. While negligence in providing proper means for the prevention of fires and in the management of the apparatus and fires may be inferred from the size and quantity of sparks or cinders emitted, when those things are shown, it will not in any case be presumed from the mere fact of a fire, where the testimony as to its cause is purely circumstantial.
2. Negligence in the conduct of a steam-tug is the failure to use the care ordinarily used by careful men; and, it being well known that the escape of sparks cannot be absolutely prevented by the use of any appliance yet invented, the owner cannot be held responsible upon the ground of negligence for not doing what it is practically impossible to do; citing *Railroad Co. v. Burrows*, 33 Mich. 6; *Batterson v. Railway Co.*, 49 Id. 184.
3. Science has as yet been able to reduce the danger in the use of steam as a motive power to the minimum only; and when a party so using it has availed himself of the means generally used for the protection of property, he cannot be held liable because such means are not always effective or adequate.
4. An allegation in a declaration in a negligence case that defendant willfully left the spark-arrester of his steam-tug open, and thereby allowed sparks to escape and be carried by the wind upon plaintiffs' docks, and set fire to them, implies that the act was done with a set purpose to accomplish the results which followed, and involves more than negligence, and implies malice.
5. It is a matter of common knowledge that draught is essential to the operation of a steam craft; that so far it has been found practically impossible to arrest the emission of all sparks, and at the same time preserve the necessary draught; that sparks will escape, and fires will occasionally occur; and it is only when the want of ordinary care is shown in the selection, care, and operation of appliances or in the management of fires on such craft, or where the absence of proper appliances or neglect in their management or in the management of the

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fires can be inferred from peculiar circumstances, that the owners and operators of such craft can be made liable.

Error to Muskegon. (Dickerman, J.) Argued October 30, 1891. Decided December 21, 1891.

Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

L. N. Keating and *Smith, Nims, Hoyt & Erwin* (*E. F. Uhl*, of counsel), for appellant, contended:

1. Actions for negligence are based upon two propositions:
   a—Negligence cannot be presumed, but must be proved affirmatively.
   b—A declaration for negligent injury must aver the fact and manner of negligence, and the plaintiff should be confined to its allegations.
   The objects of these rules are:
   a—To inform the court what the plaintiff claims and expects to prove.
   b—To give the defendant an opportunity to learn what the plaintiff claims he has been negligent in, and to prepare his defense.
   —Citing *Railroad Co. v. Marcott*, 41 Mich. 488; *Railway Co. v. Stark*, 88 Id. 714; *Railroad Co. v. Shanefelt*, 47 Ill. 497; *Lund v. Tyngsboro*, 11 Cush. 563; *Shaw v. Railroad Co.*, 8 Gray, 45; *Parker v. Railroad Co.*, 16 Barb. 315; *Max v. Roberts*, 12 East, 89; *Rex v. Everett*, 8 Barn. & C. 114.
2. It was error to permit plaintiffs' counsel, in his argument to the jury, to state that the "defendant is an association of individuals which has a grip upon the business of every lumberman which is on this river or on this lake. That corporation can crush any single mill-owner, if the law will permit it, who excites its animosity, to whom it can say, 'We shall deliver you no more logs;'"—said statements being entirely unsupported by any evidence in the case; citing *Seligman v. Ten Eyck Estate*, 60 Mich. 267; *Bedford v. Penny*, 58 Id. 428.
3. The plaintiffs had contract relations with the defendant, by which it was delivering logs at plaintiffs' mill, and in pursuit of its business was at plaintiffs' dock. Where a party invites another to enter into a contract, and the invited party has to use steam-power, there can be no liability for fire caused by

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its use if the doctrine of *Railroad Co. v. Spear*, 44 Mich. 169, applies to this case.

4. One authorized to use steam-power is not liable for injuries unavoidably produced by a fire, unless the plaintiff shows that such fire was caused by negligence, and he has the burden of proof to establish such fact. The user of steam-power is not obliged absolutely to prevent the escape of sparks, but is simply obliged to use machinery that other people doing the same kind of business use who are considered careful, cautious persons; citing *Read v. Morse*, 34 Wis. 315; *Butcher v. Railroad Co.*, 67 Cal. 518; Shear. & R. Neg. § 668.

Bunker & Carpenter, for plaintiffs, contended:

1. If it were necessary to give direct evidence by those who saw the fire communicate from the tug to the dock, the point made that there was no testimony to go to the jury would be well taken; but such is not the rule. The fact may be shown by any circumstances tending to prove it; citing *Hoyt v. Jeffers*, 30 Mich. 181, 189; *Alpern v. Churchill*, 53 Id. 607.

2. Many a case has been held properly submitted to the jury where the plaintiff's testimony was much weaker; citing *Hoyt v. Jeffers*, 30 Mich. 181; *Marcott v. Railroad Co.*, 47 Id. 1; *Alpern v. Churchill*, 53 Id. 607; *Jones v. Railroad Co.*, 59 Id. 437; *Witheral v. Booming Co.*, 68 Id. 48, 51; *Hayes v. Railroad Co.*, 111 U. S. 228, 242; *Wilson v. Railroad Co.*, 48 Minn. 519; *Nichols v. Railway Co.*, 36 Id. 452; *Field v. Railroad Co.*, 32 N. Y. 339; *Webb v. Railroad Co.*, 49 Id. 420; *Briggs v. Railroad Co.*, 72 Id. 26; *Kelsey v. Railway Co.* (S. D.), 45 N. W. Rep. 204; *Mills v. Railway Co.*, 76 Wis. 422; *Hoffman v. Railway Co.*, 43 Minn. 334; *Beggs v. Railroad Co.*, 75 Wis. 444; *Johnson v. Railway Co.*, 77 Iowa, 666; *Dean v. Railway Co.*, 39 Minn. 413; *Karsen v. Railway Co.*, 29 Id. 12; *Railway Co. v. Ayers* (Tex.), 8 S. W. Rep. 538; and all that is required of the plaintiff is to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to; citing *Hayes v. Railroad Co.*, 111 U. S. 228.

3. In the fourth and eighth counts the use of slabs as fuel around and near the docks and lumber is set up as an act of negligence. The use of any particular kind of fuel could not be in itself an act of negligence independent of other circumstances, but in connection with them it might constitute an act of gross negligence. The testimony in regard to the change of fuel from slabs to coal was proper for the purpose of showing that coal could be used and was used on this same boat as

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fuel without danger to adjacent property. It tended strongly to sustain the plaintiffs' claim that, under the circumstances in this case, the defendant was negligent. It was on the same footing as the testimony in *Alpern v. Churchill*, 53 Mich. 607, where the Court held that the plaintiff should have been allowed to show that the spark-arrester on the mill-burner when the fire occurred had been replaced after the fire by a new one, which did not allow the escape of sparks.

4. There was no error in refusing to compel plaintiffs to elect before the trial on which count of the declaration they would rely; citing *Cook v. Perry*, 43 Mich. 623.

5. The following questions: "Did you ever know of the McGraft throwing sparks?" "Is she in the habit of throwing sparks?" "Did she throw off sparks while you were on her?"—were proper; citing *Hoyt v. Jeffers*, 30 Mich. 181; *Alpern v. Churchill*, 53 Id. 607; *Kendrick v. Towle*, 60 Id. 363; *Sheldon v. Railroad Co.*, 14 N. Y. 218; *Field v. Railroad Co.*, 32 Id. 339; *Webb v. Railroad Co.*, 49 Id. 420; and it is said of railroad engines that it is a matter of common knowledge that they do emit sparks which start fires; citing *Karsen v. Railway Co.*, 29 Minn. 12; and the same is true of steamboats, and especially of tugs that have powerful engines and strong draughts; citing *Kendrick v. Towle*, 60 Mich. 363.

6. The court was not requested to rule on the propriety of the alleged objectional argument to the jury, nor to correct its impropriety, if any existed, by a proper instruction to the jury, nor to correct the counsel and define any bounds to his argument, and therefore the Court cannot review the question; citing *Mayo v. Wright*, 63 Mich. 32; *Manufacturing Co. v. Car Co.*, 65 Id. 564; and the fact that the remarks complained of were made in reply to argument of defendant's counsel is sufficient reply to the claim of error; citing *Miner v. Lorman*, 66 Mich. 532.

7. The court properly defined negligence in the sense used in this case to be "the failure to observe for the protection of the interest of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury;" citing *Railway Co. v. Stark*, 38 Mich. 717; *Brown v. Railway Co.*, 49 Id. 153; *Kendrick v. Towle*, 60 Id. 367,

Uhl & Crane, of counsel, for appellant, contended in reply:

1. The counts in the declaration are inconsistent, and so repugnant that they cannot stand together, and the plaintiffs should have

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been compelled to elect between them; citing *Ives v. Williams*, 53 Mich. 636.

2. Direct and positive proof that the fire was occasioned by a spark thrown out of the smoke-stack of the defendant's tug would not be *prima facie* evidence of negligence on its part; citing *Bachelder v. Heagan*, 18 Me. 32; *Burroughs v. Railroad Co.*, 15 Conn. 124; *Rood v. Railroad Co.*, 18 Barb. 80; *Smith v. Railroad Co.*, 37 Mo. 287; *Gandy v. Railroad Co.*, 30 Iowa, 420; *Ruffner v. Railroad Co.*, 34 Ohio St. 96; *Jennings v. Railroad Co.*, 93 Penn. St. 337; *Railroad Co. v. Latshaw*, Id. 449.

3. The plaintiffs, having employed the defendant to come to their docks with steam-tugs upon their business, have no right to complain of negligence on the part of the defendant; citing *Railroad Co. v. Spear*, 44 Mich. 169.

4. Proof of previous negligent acts on the part of the engineer who was on the tug during the day on which the fire occurred would not be competent, unless the plaintiffs proved that he was negligent at or about the time the fire broke out; citing *Thompson v. Railway Co.*, 84 Mich. 281.

5. The instruction that the counsel for plaintiffs had a right to comment on the fact that the defendant gave no testimony on the trial was error; citing *Moore v. Wright*, 90 Ill. 470; *Association v. George*, 97 Penn. St. 238; *Flynn v. Railroad Co.*, 18 Jones & S. 375; *Anderson v. Russell*, 34 Mich. 109.

6. In support of the proposition that recovery could not be had under any count of the declaration, counsel reviewed the testimony in connection with each count.

McGRATH, J. A fire occurred on plaintiffs' lumber docks, which consumed certain tramways and docks and a large quantity of lumber. This suit is brought to recover the value of the property destroyed, upon the theory that the fire was occasioned by a spark from one of defendant's tugs by reason of defendant's negligence. Under the testimony the court should have directed a verdict for defendant.

The declaration contained eight counts, alleging negligence as follows:

1. That defendant "failed to supply the tug with a spark-arrester on its smoke-stack, or with any other

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appliance or device sufficient to prevent the escape of sparks, burning cinders, and brands from its smoke-stack, and without using any adequate means to prevent the escape of sparks and burning cinders and brands as aforesaid."

2. That the tug was "provided with a spark-arrester in its smoke-stack, so constructed that it could be opened or closed, as might be desired, increasing the draught when open, but at the same time allowing the sparks and burning cinders and brands to escape from the smoke-stack; and on, to wit, the 19th day of July, 1888, while said defendant was using said tug in the operation of its business at and near the plaintiffs' docks and tramways, it willfully, carelessly, and negligently left said spark-arrester open a long time, to wit, for thirty minutes."

3. That the spark-arrester was not sufficient to prevent the escape of sparks, and by reason of the defective condition of said spark-arrester.

4. That defendant used slabs made of pine, hemlock, and other woods, which, while burning, formed and threw off sparks, without taking any precautions to prevent the escape of sparks.

5. That, "while the said tug was lying at and near the said docks and tramways of the plaintiffs, the said defendant willfully, carelessly, and negligently opened the furnace door of said tug, and left the same open for a long time, to wit, for the space of five minutes, at a time when the wind was blowing violently in a direction from said tug towards said docks, tramways, bottoms, and lumber of the plaintiffs, and thereby wrongfully, carelessly, and negligently largely increased the draught through the furnace and smoke-stack of the said tug, and caused a large number of sparks and burning cinders and brands to be thrown from said smoke-stack, and the same were blown and carried by the wind upon and against docks, tramways, bottoms, and lumber, and set fire to and ignited the same."

6. That while said tug was lying at plaintiffs' docks the defendant "willfully, carelessly, negligently, and wrongfully turned its exhaust steam into and through its smoke-stack, thereby largely increasing the draught through said smoke-stack, and causing the same to emit and pour forth a large number of sparks and burning cinders and brands at a time when the wind was blowing violently in a direction from said tug towards said docks, tram-

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ways, bottoms, and lumber; and by reason thereof said sparks and burning cinders and brands were blown upon and against said docks."

7. That "said tug was so constructed that when in motion, and when the fire was burning in its furnace, a large number of sparks and burning cinders and brands were from time to time emitted from its smoke-stack, and were at times carried by the wind, maintaining their vitality so as to be able to ignite such combustible material as they should come in contact with; yet the defendant, well knowing the character and condition of said tug, and its liability to emit sparks and burning cinders and brands, on, to wit, the 19th day of July, 1888, when the wind was blowing violently, did willfully, carelessly, negligently, and wrongfully run said tug up to and near the docks, tramways, bottoms, and lumber of said plaintiffs, and kept it there in such a position that the wind was blowing from said tug in a direction towards said docks, tramways, bottoms, and lumber, and while said tug was so placed kept the fire in its furnace burning."

8. That it "was the duty of the said defendant to use such appliances on its said tugs, and employ such means in operating them, as would not endanger the safety of the mills, docks, and lumber on said Muskegon lake and river, and would not subject them to any needless risk and danger from fire; and it also became and was the duty of the said defendant to take extraordinary precautions in times of high wind in the management of its said tugs, so as not to endanger said mills, docks, tramways, and lumber, or to subject them to any risk of taking fire from said tugs; yet the said defendant, not regarding its said duty, but contriving and intending to injure the said plaintiffs, would not and did not use proper appliances on its tugs, and would not and did not employ such means as would not endanger the safety of the mills, docks, and lumber on said Muskegon lake and river, and would not subject them to risk and danger from fire, but, on the contrary, * * * failed and neglected to supply its said tugs with proper spark-arresters or other proper or suitable device for preventing the escape of sparks and burning cinders and brands from said tugs, and has failed, neglected, and refused to employ proper means in operating said tugs in this, to wit: that it has continuously, persistently, carelessly,

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negligently, and wrongfully used and employed on said tugs, as fuel for general steam use therein, pine, hemlock, and other slabs, which are utterly unfit for said purpose, as they make and cause large quantities of light sparks and burning cinders and brands to be thrown off, capable of being carried long distances by the wind before they are extinguished, and seriously endangering the safety of the docks, lumber, and mills on said lake and river; and on, to wit, the 19th day of July, 1888, the said defendant, still disregarding its said duty, but contriving and intending to injure the plaintiffs, while a very high wind was blowing, carelessly, negligently, and wrongfully moved one of its said tugs, which it had failed to supply with a spark-arrester or other suitable device for preventing the escape of sparks and burning cinders and brands, in which it was then burning as fuel pine, hemlock, and other slabs, up to and against certain other docks, tramways, bottoms, and lumber."

The testimony as to the fire cause was circumstantial. Plaintiffs' mill was located about 850 feet southerly from their dock line. There were three other mills in the same locality,—the McGraft mill, situated 1,000 feet north-east from the point where the fire took; the Blodgett mill, located about 875 feet west-south-west; and the Shippey mill, which was about 1,200 feet distant in a southerly direction. Each of these mills had large refuse burners attached, and several fires had been caused by fires from these burners. The wind was blowing fresh from the north-west, and the tug passed the docks about 15 minutes before the fire was noticed. No sparks were seen coming from the tug, although she was seen to pass by several witnesses. There was no testimony tending to show that the tug had before that time set any fires; on the contrary, it was shown that she had not.

While negligence in providing proper means for the prevention of fires and in the management of the apparatus and fires might be inferred from the size and quantity of sparks or cinders emitted, when those things are shown, negligence will not in any case be presumed from

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the mere fact of a fire, when the testimony as to the cause of the fire is purely circumstantial.

The defendant had business with the plaintiffs, and the tug was in the vicinity of plaintiffs' docks in the course of that business. The testimony clearly showed that the smoke-stack of said tug was supplied with a spark-arrester. There was no testimony tending to show that the spark-arrester was defective, or that it was not regarded as sufficient, or that it was not of the kind ordinarily used for that purpose, or that it was not as efficient as any other apparatus, or that it was not operated, or that the furnace door had been opened or left open for any time, or that the construction of the fire apparatus or smoke-stack of said tug was defective, or that defendant was not taking the ordinary precautions to prevent the escape of sparks, or that any other or more efficient apparatus or means to prevent the escape of sparks were in use by others. The proofs showed that defendant used slabs for fuel, but there was no testimony tending to show that the use of slabs for fuel was unusual in that locality.

It is alleged that defendant did not use adequate means to prevent the escape of sparks; but, as already said, it was shown that a spark-arrester was provided and in use. Negligence is the want of ordinary care. Negligence in the conduct of a tug is the failure to use the care ordinarily used by careful men. It is well known that the escape of sparks cannot be absolutely prevented by the use of any appliance yet invented. Defendant cannot be held responsible upon the ground of negligence for not doing what it is practically impossible to do. *Michigan Central R. R. Co. v. Burrows*, 33 Mich. 6; *Batterson v. Railway Co.*, 49 Id. 184. Science has as yet been able to reduce the danger in the use of steam as a motive power

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to the minimum only; and when a party using steam has availed himself of the means used generally for the protection of property, he cannot be held liable because the means are not always effective or adequate. He is only liable when he neglects to use or carelessly and negligently uses those appliances which science and ingenuity have invented to reduce the probabilities of fire.

The testimony was speculative and conjectural. The only testimony having the slightest bearing upon the allegation that the furnace door was open or left open was that of the engineer who subsequently operated the tug, who, speaking with reference to tugs generally, said that, if the damper and furnace door were closed, and the exhaust on the outside, no sparks would be thrown out, because there would be no draught. But the declaration does not charge as negligence an open damper, nor does it appear that the tug could be operated without any draught. The same witness was asked, "What was the character of that tug for throwing off sparks?" and replied: "Well, she was like all other small boats with small boilers. If the engine—if you are crowding her—she has got to throw sparks." There was no testimony that she was being crowded at plaintiffs' docks. He was then asked,—

"*Q.* Did she throw off sparks while you were on her?

"*A.* She would throw off sparks, of course, according to the way you fired her,—according to the distance. If you put in a fire to Blodgett & Byrne's, and run as far as Hackley's, or run as far as Hamilton's, and not put in any fire, and you jar against a dock, no matter whether the exhaust is in or out, she will throw fire, providing they don't put in any fresh fire. * * *

"*Q.* Are sparks apt to be thrown when she stops and starts?

"*A.* Well, not when she stops. When she is backing up, if you run up to a dock at a nice little gait,—that

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is the way they express themselves (tug-men), a nice little gait,—if you run pretty fast up to a dock, and you stop and back up, whether the exhaust is in or out, it don't make any difference, she will throw sparks just the same.

"*Q.* What is the effect when the exhaust is in the stack?

"*A.* The effect is, she throws it further, harder, and more fire.

"*Q.* What kind of sparks will she throw when the exhaust is in?

"*A.* When the exhaust is in? According to the fire. If you have got a green fire, she won't throw as many sparks as if you run your fire off five minutes. She will throw more sparks when you run your fire five minutes than a green fire. A green fire is a fire of fresh slabs or any kind of wood."

On cross-examination the witness was asked:

"You said something about this particular boat throwing sparks in case she run up and hit a dock?

"*A.* Nothing about a particular boat. I said any boat.

"*Q.* They are all alike in that respect?

"*A.* Well, they are all alike of those burning wood."

There was no testimony tending to show that the tug touched or jarred the dock; none that any fuel had or had not been put in; none that she was run up to the dock at a nice little gait, or pretty fast; and none that the exhaust was in the stack. The testimony was that she ran up slowly to within 8 or 10 feet of the dock, and one of the men on board handed an oar to an employé who was engaged in booming logs at that point. There was the testimony of one witness that she backed a little, to get out, after the oar was delivered; but none that it was carelessly or unnecessarily done, or with the spark-arrester open. One witness, who had been a fireman on the tug, was asked if he ever knew the tug to throw sparks, and he answered, "Yes." He was then asked if she was "in the habit of throwing sparks," and

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answered, "Yes;" but no time, place, or conditions were asked for or given. It was not shown whether the arrester was in use at the time, or at what rate of speed she was going, or where she was at the time or times.

The use of the word "willfully" in the 2d, 5th, 6th, and 7th counts involves design and purpose. The allegation that defendant willfully left the spark-arrester open, and thereby allowed sparks to escape and be carried by the wind upon plaintiffs' docks, and set fire to them, implies that the act was done with a set purpose to accomplish the results which followed the act. It involves more than negligence; it implies malice. The word has no office in the count unless given its ordinary acceptation. There could be no recovery under the evidence upon these counts.

It was held in *Alpern v. Churchill*, 53 Mich. 607, that—

"Negligence implies fault, and cannot be predicated of a lawful and customary use of one's own premises."

Neither can it be predicated of a lawful and customary use of a water-way. As was said in *Michigan Central R. R. Co. v. Coleman*, 28 Mich. 440:

"The degree of care required in any business must be proportionate to its nature and risks; but the law does not require business to be conducted upon any unusual basis, though the business be one of great risks, and requiring great caution. All rules applied must be reasonable, and not oppressive, and must be applied with reference to the ordinary conduct of affairs."

It is a matter of common knowledge that draught is essential to the operation of a steam craft; that so far it has been found practically impossible to arrest all sparks and at the same time preserve the necessary draught; that sparks will escape, and fires will occasionally occur; and it is only when the want of ordinary care is shown in the selection, care, and operation of appliances or in the management of fires on such craft, or where the

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absence of proper appliances or neglect in their management or in the management of the fires can be inferred from peculiar circumstances, that those owning and operating such craft can be made liable.

The defendant is entitled to a verdict upon this record, and the judgment is therefore reversed, and a new trial ordered, with costs of both courts to defendant.

The other Justices concurred.

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MALCOLM MCDONALD v. CHARLES L. ORTMAN.

Question for jury—Commissions on sale of real estate.

1. Where plaintiff's testimony makes a *prima facie* case, and is contradicted in material parts by that of the defendant, the case should be submitted to the jury.
2. Testimony tending to show that the plaintiff made a special agreement with the defendant that he should be paid a commission of two and one-half per cent. on whatever price certain real estate was sold for, if he was instrumental in bringing about the sale, and that he was instrumental in bringing about a sale for $45,000, and also what his services were worth in estimating the pine upon the land preparatory to a sale thereof, and that the defendant requested him to proceed and find a purchaser from time to time, which he did, if uncontradicted, entitles the plaintiff to recover.

Error to Wayne. (Hosmer, J.) Argued October 28, 1891. Decided December 21, 1891.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

James H. Pound, for appellant.

DeForest Paine, for defendant.

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CHAMPLIN, C. J. The plaintiff brought this suit to recover commissions which he claims are owing to him by defendant for his efforts in selling certain pine lands belonging to defendant. The declaration also contains the common counts in *assampsit*.

Upon the trial he gave testimony tending to show that he made a special agreement with the defendant that he should be paid 2½ per cent. commission on whatever price the land was sold for, if he was instrumental in bringing about the sale. He also introduced testimony tending to show that he was instrumental in bringing about a sale for $45,000. He also showed what his services were worth in estimating the pine upon the land preparatory to a sale thereof, and he introduced testimony tending to show that the defendant requested him to proceed and find a purchaser from time to time, which he did. There is no doubt that, if there had been no testimony introduced on the part of the defendant, plaintiff would have been entitled to recover.

The defendant and the purchaser testified on behalf of defendant directly contrary to plaintiff's testimony in material parts, whereupon the court directed a verdict for the defendant.

In this we think the court erred. The plaintiff had made at least a *prima facie* case, and, although the testimony of the defendant tended to contradict it, the case was one that should have been submitted to the jury.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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NAPOLEON WHITE v. JAMES PRIOR, PRINCIPAL DEFENDANT, AND GEORGE FEARNLEY AND NANCY VANDECAR, LOG-OWNERS.

Attachment—Log-lien proceedings—Service—Jurisdiction.

1. Substituted service in an attachment suit is only permitted in case the defendant cannot be found, and the officer must certify to such fact before making such service.
2. Service on January 29 of a writ of attachment in a log-lien suit returnable February 4 confers no jurisdiction on the justice issuing it; citing *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120.
3. A certificate by a sheriff that he used due diligence in trying to get service of a writ of attachment upon the defendant is not equal to a certificate that the defendant could not be found, and courts are not justified in drawing that inference from such a certificate.
4. Where substituted service is made in an attachment suit, in order to give the justice jurisdiction, the return must show that the officer served the writ by leaving a copy thereof and of the inventory, certified by him, with the person in whose possession he found the property, it appearing therefrom that he was unable to find any last place of residence of the defendant; which condition is not fulfilled by a statement that the property was not, of his knowledge, in the possession of any person at time of its seizure.
5. Personal service of a justice's writ of attachment, unless accompanied by the statutory inventory duly certified, is insufficient to give the court jurisdiction; citing *Langtry v. Circuit Judges*, 68 Mich. 451.

Error to Clare. (Hart, J.) Submitted on briefs October 28, 1891. Decided December 21, 1891.

Attachment under log-lien law. Defendant log-owners bring error. Reversed, and proceedings quashed. The facts are stated in the opinion.

C. H. Rose, for appellants.

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W. A. Burritt, for plaintiff.

GRANT, J This is a proceeding by attachment under the "Log Lien Statute" (Act No. 229, Laws of 1887; 3 How. Stat. §§ 8427*a*-8427*p*).

The writ was issued January 26, made returnable February 4, served on the principal defendant January 29, and the property in question was seized on January 26. The officer returned that no one, to his knowledge, was in possession of the property attached. Appellants were the owners of the property, and, learning that it was attached, appeared specially, and moved to quash the proceedings. This motion was overruled, and judgment entered against the principal defendant and these appellants.

These proceedings were void for several reasons.

1. The justice obtained no jurisdiction, for the reason that service was not made within the time prescribed by the statute. *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120. When the motion to quash was made, the return of the officer showed a seizure of the property and the service of a certified copy of the writ upon Prior. Plaintiff and the justice were then proceeding upon the theory of a valid service. It was conceded that service was not made in time to confer jurisdiction, and thereupon the justice permitted the officer to amend his return, certifying that he used due diligence in trying to get service on the principal defendant, and that, after diligent search and inquiry, he was unable to find any last place of residence of said defendant; but that on January 29 he found him, and made service, as the original return shows. They then attempted to take the proceedings provided by statute where the defendant cannot be found.

Substituted service is only permitted in case the defendant cannot be found. The return of the officer

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does not show this to be the fact. He must certify to that fact before making substituted service. On the contrary, defendant was found within the county, but a little too late to make personal service upon him. The jurisdiction of justices must plainly appear; it cannot be left to inference. A certificate by the sheriff that he used due diligence in trying to get service is not equal to a certificate that the defendant could not be found, and courts are not justified in drawing that inference from such a certificate.

2. The return does not show that the officer served the writ by leaving a copy thereof and of the inventory, certified by him, with any person in whose possession the property seized was found. The return does not certify that the property was not in the possession of any one. It does not show that he took any steps to ascertain whether any one had possession. The only statement in the return, bearing upon this point, is the expression, "not of my knowledge in the possession of any person." Such a return gives the court no jurisdiction. How. Stat. § 6841, and authorities there cited.

3. The return does not show that the officer served a certified copy of the inventory of the property seized upon either the principal defendant or the owners of the attached property. *Langtry v. Wayne Circuit Judges*, 68 Mich. 451.

It is unnecessary to refer to the other questions raised. The judgment of the court below is reversed, and the proceedings quashed.

The other Justices concurred.

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CHARLES SCHUFFERT v. CLARA GROTE.

Deed—Delivery.

A father executed a deed of three city lots to his son, and handed it to him, at the same time stating that he would not like to see the deed on record until after his death, to which the son assented, and handed the deed back to his father, who retained possession of the lots, on which were two houses, in one of which he lived, and rented the other, and collected the rents. The father subsequently destroyed the deed, and conveyed two of the lots to the son and the other to a foster granddaughter, who at his request had left an employment where she was earning fair wages, and come to his house, after the death of his wife, and taken care of him for two years, which care was continued until his death, a year and a half after the execution of the deed. And it is held that the first deed was not delivered, and conveyed no title to the son, and that the consideration for the deed to the granddaughter was ample, and the deed valid.

Appeal from Wayne. (Reilly, J.) Argued October 28, 1891. Decided December 21, 1891.

Bill to set aside a deed, and confirm the title to the land in complainant. Complainant appeals. Decree dismissing bill affirmed. The facts are stated in the opinion.

E. S. Clarkson (*John B. Whelan,* of counsel), for complainant.

James H. Pound, for defendant.

GRANT, J. The bill in this case is filed to set aside a deed of the land in controversy, executed by complainant's father to defendant, and to confirm the title in said land to himself.

His claim is that his father executed a deed to him May 1, 1888; that he gave it back to his father at the

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same time, telling him to keep it as he did not desire to take actual possession of the property until after his father's death; that his father, on August 21, 1889, executed a deed of this same land to the defendant; that defendant knew of the former deed to complainant, and therefore cannot be considered a *bona fide* purchaser.

Defendant answers this claim by admitting that such a deed was drawn up to complainant, intended only as a testamentary disposition, subject to revocation, and not to take effect until after the father's death; that it was revoked and destroyed by his father,—was never delivered; that he purchased without notice, and for a valuable consideration.

The case was tried in open court, and a decree rendered dismissing the bill.

All the testimony of the complainant as to the execution of the deed and as to what took place between him and his father is excluded by the statute, because the facts testified to were equally in the knowledge of the deceased. The only competent evidence of the execution of the deed is that of those who were present aside from complainant. These were two who signed it as witnesses, and one of whom drew it. They testified that the deed was signed, acknowledged, witnessed, handed to complainant, and by him immediately handed back to his father. One of these did not know what was said at the time. The other testified that the father said that he—

"Calculated to deed that property to Charles, that his son Gus had had his share, so that there would be no trouble after he was dead; that the father said he would not like to see the deed go on record until after he was dead; and that Charles said that he need not be afraid the deed should go on record, and that he could keep it himself."

This is all the evidence showing a delivery of the deed.

The land consisted of three lots. There were two

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houses upon them, in one of which the father lived, the other of which he rented, and collected the rents.

The object of a delivery is to indicate an intent on the part of the grantor to give effect to the instrument. It was clearly not the intention of the grantor in this case to convey to his son either possession or title until his death. *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Burnett v. Burnett*, 40 Id. 364. The fact that the grantor retained this deed, as well as the possession of the property, that he subsequently destroyed the deed and executed two others,—one to the defendant for one lot, and the other to the complainant for the other two,—and that he would not consent to the recording of the deed, is convincing proof that the deed was not delivered and conveyed no title to complainant.

The defendant was a foster grandchild of Mr. Schuffert, the father. At his request, after the death of his wife, defendant left an employment where she was earning fair wages, and came to his house to take care of him. This she did faithfully for three years and a half, and until his death. After two years of such service, Mr. Schuffert, in consideration of such services already rendered and to be rendered in the future, executed to her the deed in controversy. The consideration was ample, and the deed valid.

The decree is affirmed, with costs.

The other Justices concurred.

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THE PEOPLE, EX REL., THE ATTORNEY GENERAL, v. THE VILLAGE OF HIGHLAND PARK.

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Municipal corporations—Alteration of boundaries—Repeal of charter—Vacancy in office—Special election—Notice.

By an amendment to the charter of the city of Detroit, the greater portion of the territory of the village of Highland Park was attached to said city. The majority of the inhabitants of the village, including all of its officers except three trustees and the street commissioner, lived in the detached territory. After the act had taken effect *all* of the trustees met and adopted a resolution to fill the offices made vacant by the act, and ordered a special election for that purpose, which was held, and 41 of the 49 voters residing in the undetached territory voted at said election, and the officers so elected qualified and entered upon the discharge of their duties. There was nothing in the act to indicate an intention on the part of the Legislature to repeal the village charter, but, on the contrary, it expressly contemplated its continuance. And in *quo warranto* proceedings to settle the question of the continued existence of the village it is held:

a—The charter of the village was not repealed by the detaching act.

b—No repeal can be implied because so few inhabitants and so small a territory were left in the undetached portion of the village, there being no constitutional limit to the number of inhabitants or extent of territory required for the organization of a village; those questions being entirely within the discretion of the Legislature.

c—Legislating a majority of the village officers out of office did not operate to repeal the charter; nor was the corporation dissolved by the creation of vacancies in the offices of a majority of the village council, thereby destroying the power to call a special election to fill such vacancies, which power lies dormant in such case until the next regular election, or until the Legislature provides the machinery for calling an election.

d—The offices of the trustees whose residence was changed by the detaching act became vacant, and their participa-

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tion in the meeting of the council thereafter held was unwarranted, and without legal effect, they being no longer *de facto* officers.

e—Without deciding whether the three remaining trustees constituted a quorum at said meeting, inasmuch as the people acted upon the validity of the notice of election given, which was understood by all of the 49 electors, all but eight of whom voted, and no one's rights having been injuriously affected, and no one defrauded of the right to vote, the election must be held valid.

Quo warranto. Argued October 28, 1891. Decided December 21, 1891.

Information in the nature of a *quo warranto* to test the right of respondent to exercise the franchises of a municipal corporation. The facts are stated in the opinion.

A. A. Ellis, Attorney General (*Frank B. Leland,* of counsel), for relator.

H. E. Spalding, for respondent.

GRANT, J. The information in this case was filed by the Attorney General, and charges that the respondent has, since the 13th day of May, 1891, usurped the franchise of being a municipal corporation. To the information the respondent interposed a plea, and to this plea the relator demurred.

The facts necessary to an understanding of the questions involved are these: The respondent was incorporated by Act No. 371, Local Acts of 1889. The village council consisted of six trustees, and the other village officers were the president of the council, clerk, treasurer, assessor, constable, and street commissioner. In 1891 the Legislature passed an act known as "House Bill No. 214," amendatory of the charter of the city of Detroit, and

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enlarging its boundaries.[1] By this act the greater part of respondent's territory was detached from it and attached to the city of Detroit. The greater portion of the inhabitants of the village were residents of the detached territory. About 200 inhabitants were still left in the portion not detached, 49 of whom were voters. This act was given immediate effect, and was approved by the Governor May 13. The president, three of the six trustees, the clerk, treasurer, assessor, and constable all reside in the detached territory, leaving only three trustees and the street commissioner residents of the undetached territory. On May 28 the village council met, at which meeting were present all the trustees, those residing in the detached portion as well as those residing in the other portion. They adopted a resolution to fill the offices made vacant by the act detaching the territory, and ordered a special election for the election of new trustees and other officers. This election was called and held. All the voters in the village registered, and 41 of them voted. The officers so elected qualified, and entered upon the discharge of their duties. The undetached territory was, previous to the organization of the village, within the corporate limits of the townships of Hamtramck and Greenfield. The detaching act provided that it should not affect or interfere with the assessment, levy, and collection of taxes for the year 1891 on any of the lands detached from the respondent, or from the other municipalities. It also provided that the board of trustees of the respondent should rearrange the school-districts within its limits.

1. It is first insisted that the detaching act repealed the respondent's charter, and that the territory unde-

[1]Act No. 324, Local Acts of 1891.

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tached reverted to the townships from which it was taken to organize the village. There is nothing in the act to indicate any intention on the part of the Legislature to repeal its charter. On the contrary, the act expressly contemplates its continuance. If there had been a provision in the body of the act providing for the repeal, it would have been void, because of the failure to express that object in the title. No repeal can be implied because so few inhabitants and so small a territory were left. The Constitution fixes no limit to the number of inhabitants or the extent of territory required for the organization of a village. That is entirely within the discretion of the Legislature. The fact that a majority of the officers are legislated out of office does not operate to repeal the charter. Nor will the occurrence of vacancies in a majority of the governing board of a municipal corporation, thereby destroying the power to call a special election to fill vacancies, operate as a dissolution of the corporation. The power in such case lies dormant until the next regular election, or until the Legislature shall provide the machinery for calling an election. 1 Dill. Mun. Corp. § 166 (110); 15 Amer. & Eng. Enc. Law, 1198; *Philips v. Wickham*, 1 Paige, 597. In this last case the rule is concisely stated as follows:

"If the corporators have the power in themselves to supply the deficiency in their body, their rights are not extinguished, but only dormant."

The power of the respondent in the present case to fill the vacancies by election cannot be doubted.

2. The statute provides that if any officer shall cease to be a resident of the village during his term of office the office shall be thereby vacated. How. Stat. § 2787. It would be doing violence to the natural meaning of language to hold that these offices did not become vacant

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the moment that their incumbents ceased to be residents of the village. *People v. Morrell*, 21 Wend. 575. But respondent's counsel urges that these trustees, in their proceedings to call an election, were officers *de facto*, and he cites the following authorities: *Woodside v. Wagg*, 71 Me. 207; *Case v. State*, 69 Ind. 46; *Morton v. Lee*, 28 Kan. 286; *Petersilea v. Stone*, 119 Mass. 467; *Cary v. State*, 76 Ala. 78. But in these cases the acts of the officers were attacked collaterally, and the officers had continued to exercise their functions after the expiration of their terms, without break, or question by the public. They would undoubtedly have been removed upon information filed against them on behalf of the state. The present case, like that of *People v. Morrell, supra*, is a direct proceeding to determine the right to the offices, and the validity of the action of the village council in assuming to perform the functions of office in ordering an election. An officer *de facto* was defined by Lord Ellenborough to be—

"One who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law."

The very action of the council in the present case was predicated upon the existence of vacancies created by the law, and no declaration or resolution by the council was necessary to establish the fact. The participation, therefore, of these removed trustees in the meeting of May 28 was unwarranted, and without any legal effect.

3. The statute provides that a vacancy in the office of president or of any trustee, occurring more than six months before an annual election, shall be filled by a special election. How. Stat. § 2789. So far as this case is concerned, it is unnecessary to determine whether the three remaining trustees constituted a quorum, as respond-

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ent contends. The people acted upon the validity of the notice. All the electors understood it, and all but eight voted. No one's rights have been injuriously affected, and no one defrauded of the right to vote. The election in such cases must be held valid.

Judgment must be entered for the respondent.

The other Justices concurred.

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ACCOUNTING—See BILL FOR ACCOUNTING; ESTATES OF DECEASED PERSONS (5-7); FRAUDULENT CONVEYANCES (8).

ADVERSE POSSESSION.

1. There are many ways in which an adverse holding of land may be interrupted other than by bringing suit. *Shearer v. Middleton*, 622.
2. The actual, continued, visible, notorious, and hostile possession of land is tantamount to a claim of ownership. *Id.*

ADVERTISEMENT, FORECLOSURE BY—See MORTGAGE (4, 6); RECORDING LAWS (1).

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ANIMALS, PEDIGREE OF—See EVIDENCE (12, 13).

APPEAL.

1. Act No. 73, Laws of 1891, amending How. Stat. § 7005, by authorizing service upon the agent or attorney who appears

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APPEAL—Continued.

for a party who obtains a judgment in justice's court, from which a special appeal is sought to be taken, of notice of all subsequent proceedings in the cause, is not retroactive. *Danville Stove, etc., Co. v. Circuit Judge*, 244.

2. Prior to the amendment of How. Stat. § 7005, by Act No. 73, Laws of 1891, service of notice of application for leave to appeal from justice's court, made upon the opposite party without this State, conferred no jurisdiction upon the circuit judge to allow the appeal, nor was the requirement waived by an acceptance of service outside of the State. *Id.*

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ASSAULT AND BATTERY—See CRIMINAL LAW (1, 4).

ASSIGNMENT FOR BENEFIT OF CREDITORS.

An assignment for the benefit of creditors, executed prior to the passage of the statute regulating the making of such assignments, which prefers creditors without naming them either in the body of the assignment or in a schedule annexed at the time of its execution, is void upon its face as to non-consenting creditors. *Wolf v. O'Conner*, 124.

ASSIGNMENT OF CLAIM.

1. The rule that a right of action for fraud is non-assignable has no application to an assignment of something which is in itself tangible and capable of delivery, and involving a right of property, but in such case the right to whatever remedy the assignor has follows the assignment. *Sweet v. Converse*, 2.

2. A married woman brought suit in her own name for the support of her mother. Her husband testified that the promise of the defendant to pay for such support was made to him personally, and afterwards testified that it was made to himself and wife jointly, in which latter statement he was corroborated by his wife. The husband further testified that he was willing that his wife should bring the suit in her own name. The court instructed the jury that, if they should find that the promise was made to plaintiff and her husband jointly, she could not recover in her own name;

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ASSIGNMENT OF CLAIM—Continued.

which instruction is sustained, the statement of the husband as to his wife bringing the suit in her own name not being an assignment, nor an equivalent to an assignment, of his interest in the claim sued for. *Howe v. Hyde*, 91.

ASSIGNMENT OF MORTGAGE—See RECORDING LAWS (1).

ATTACHMENT.

1. Act No. 149, Laws of 1889 (3 How. Stat. § 8016*a*), authorizing the issuance of a writ of attachment before the maturity of the debt, is construed as follows:

a—The plaintiff must show reasons for the immediate issuance of the writ, which showing must consist of *facts* within the knowledge of the affiant, and not of mere *conclusions* of fact.

b—The reason for the issuance of the writ must be shown by facts and circumstances so given in detail as to enable the circuit judge to satisfy himself from such facts and circumstances that the writ ought to issue.

c—It will not do for the affiant simply to swear that he *knows* that the defendant has assigned, disposed of, or concealed his property with intent to defraud his creditors, but the *facts* attending such disposition or concealment of the property must be set forth, and its relative value to that of the remainder of the property owned by the debtor, so that the circuit judge may know something about it as well as the affiant.

d—The fact that other creditors have levied upon a portion of the debtor's property, or that he has not sufficient property to pay his debts, will not warrant the issuance of the writ; and the allegation that the plaintiff will lose his debt if the writ is not issued before the debt becomes due is an inference or conclusion of fact for the circuit judge to draw, and not the plaintiff, from the other facts and circumstances set out in the affidavit. *Howell v. Circuit Judge*, 361.

2. Before the clerk is authorized to issue a writ of attachment under Act No. 149, Laws of 1889 (3 How. Stat. § 8016*a*), the statutory affidavit must be presented to him, with the order of allowance of the circuit judge indorsed thereon. *Id.* 369.

3. Substituted service in an attachment suit is only permitted in case the defendant cannot be found, and the officer must

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ATTACHMENT—Continued.

certify to such fact before making such service. *White v. Prior*, 647.

4. Service on January 29 of a writ of attachment in a log-lien suit returnable February 4 confers no jurisdiction on the justice issuing it. *Id.*

5. A certificate by a sheriff that he used due diligence in trying to get service of a writ of attachment upon the defendant is not equal to a certificate that the defendant could not be found, and courts are not justified in drawing that inference from such a certificate. *Id.*

6. Where substituted service is made in an attachment suit, in order to give the justice jurisdiction, the return must show that the officer served the writ by leaving a copy thereof and of the inventory, certified by him, with the person in whose possession he found the property, it appearing therefrom that he was unable to find any last place of residence of the defendant; which condition is not fulfilled by a statement that the property was not, of his knowledge, in the possession of any person at time of its seizure. *Id.*

7. Personal service of a justice's writ of attachment, unless accompanied by the statutory inventory duly certified, is insufficient to give the court jurisdiction. *Id.*

ATTORNEY AND CLIENT—See PARTIES (1).

BILL FOR ACCOUNTING.

Complainant held a verbal option under which he had the right to purchase certain tracts of pine land, mills, and a lumbering outfit within a given time and at a stated price, or secure a purchaser therefor. Not having sufficient means to make the purchase, he applied to the defendant, who agreed to pay one-half of the expense of examining the timber, and, if such examination proved satisfactory, to furnish the money with which to purchase the land and other property, and to give to complainant one-third of the net profits resulting from the transaction; in consideration of which complainant agreed to pay the remainder of the expense of such examination, and to give to defendant the sole opportunity to make the purchase, and to contribute his services in carrying out the enterprise. The purchase was made at a cost of $769,000, and the title taken in defendant's name, who, with complainant's assistance, sold enough of the lands

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BILL FOR ACCOUNTING—Continued.

to amount to over $778,000, and contracted for the manufacture of the remainder of the timber, one-half of the gross receipts of which he was to receive, the value of which timber was estimated at over $300,000. After the defendant had received over $150,000 of such receipts, and on his refusal to account with the complainant for his share of the net profits as per his said agreement, complainant filed a bill for such accounting. And it is held that the duty of the defendant to keep and render to the complainant an account of the *whole* transaction is clear, complainant having a special interest in the profits; and that his bill is properly filed, and that he should not be remitted to a court of law to recover his share of said profits. *Petrie v. Torrent*, 48.

See ESTATES OF DECEASED PERSONS (5-7).

BILL IN AID OF EXECUTION—See FRAUDULENT CONVEYANCES (1, 3, 4).

BILLS AND NOTES.

1. A single promisor may re-issue his own note, and cannot be allowed to set up a prior payment as a defense. *Stevens v. Hannan*, 13.
2. An indorser who is not directly liable may take up and re-issue a note, the promisor not being in such case prejudiced. *Id.*
3. When a note is paid by one of two joint promisors, who is directly liable thereon for its whole amount, the prior contract cannot be revived against his co-signers; and it has been held to be immaterial whether the re-issue is made before or after the maturity of the note. *Id.*

BONA FIDE PURCHASER.

1. The case of *Peters v. Cartier*, 80 Mich. 124, holding that a grantee in a quitclaim deed is not a *bona fide* purchaser, and takes only the interest of his grantor, arose under the recording laws, and is, therefore, authority only in cases arising under such laws. *Ripley v. Seligman*, 179.
2. A devisee takes no greater rights in land devised than the devisor had, and is not a *bona fide* purchaser for a valuable consideration. *Id.* 180.

See EVIDENCE (7).

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BOND—See REPLEVIN; SCHOOLS AND SCHOOL-DISTRICTS (1–3).

CERTIORARI.

1. There is no practice allowing writs of *certiorari* to issue from the Supreme Court to justices of the peace. *White v. Boyce*, 349.
2. The allowance of a writ of *certiorari* from the Supreme Court to a justice of the peace is exceptional, and only favored when necessary to prevent a failure of justice. *Id.*

CHALLENGE—See JURY.

CHAMPERTY AND MAINTENANCE—See EVIDENCE (5).

CHARGE TO JURY.

1. It is not error for the circuit judge, after stating the facts upon which the plaintiff bases a right of recovery, and which, if true, warranted him in directing a verdict in plaintiff's favor, to instruct the jury that, if they find from a fair preponderance of evidence that such facts are established, plaintiff is entitled to recover. *Sherwood v. Railway Co.*, 108.
2. It is error to instruct the jury to ascertain a given fact from the evidence, coupled with the statement that the testimony does not vary much in that regard. *Langworthy v. Township of Green*, 207.
3. Under the circumstances of this case, the request of the defendants' counsel that "fraud is not presumed, but must be proved, and the burden of proving fraud is upon the person charging it," should have been given to the jury. *Zucker v. Karpeles*, 414.

CHATTEL MORTGAGE.

1. A stipulation avoiding an insurance policy if the property be or become incumbered by a chattel mortgage, unless otherwise provided by agreement indorsed upon or added to the policy, is reasonable and valid. *Olney v. Insurance Co.*, 94.
2. The execution by one partner of a chattel mortgage upon the partnership property for his individual benefit works such a change in the *interest* of the firm as will avoid the policy, under a stipulation that it shall be void if the property

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CHATTEL MORTGAGE—Continued.

be or become incumbered by a chattel mortgage, unless otherwise provided by agreement indorsed upon or added to the policy, or if any change other than by the death of the insured takes place in the *interest*, title, or possession, whether by legal process or judgment, or by the voluntary act of the insured, or otherwise. *Id.*

3. Where, after an agreement between a mortgagor and mortgagee that a chattel mortgage on machinery in a flouring-mill shall be ignored and canceled, and the mortgaged property treated as a part of the realty (which was covered by a real-estate mortgage given at the same time as the chattel mortgage, and securing the same debt), the mortgagee sells the machinery under the chattel mortgage, such sale is void. *Dohm v. Haskin*, 145.

4. After the commencement of proceedings to foreclose a chattel mortgage, the consideration for which was in part pre-existing indebtedness due the mortgagees and their promise to pay certain notes on which they were liable contingently as indorsers, and in part cash advanced at the time of the execution of the mortgage, certain of the mortgagor's vendors replevied a small portion of the mortgaged goods, claiming to rescind the contract of sale because of the alleged fraud of the mortgagor in making the purchase, and recovered judgment. It was conceded on the trial that the mortgagees had no notice or knowledge of the alleged fraud, and that the consideration for their mortgage was *bona fide*. And in reversing the judgment the Court hold:

a—Where a debtor, for a new and valuable consideration, mortgages goods in his possession, which he has obtained under a contract of sale induced by his fraudulent practices, to a party who is ignorant of such fraud, and who acts in good faith, relying upon the ostensible ownership of the goods by the mortgagor before the defrauded vendor has rescinded the contract, the mortgagee may hold the goods against the title of the vendor, upon the equitable doctrine that, where one of two innocent parties must suffer by the wrongful act or default of another, the loss must fall upon him through whose act or neglect the third party was enabled to commit the wrong.

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CHATTEL MORTGAGE—Continued.

b—The doctrine is an equitable one, and extends no further than is necessary to protect the innocent party in whose favor it is invoked, and in this case only protects the mortgagees to the extent of the cash advanced to the mortgagor, they being already liable on the notes contingently as indorsers, and an executory promise, not changing their situation for the worse, not being such a consideration as will bring them within the protection of *bona fide* mortgagees or purchasers.

c—It being conceded that the rights of the mortgagees up to the amount of cash advanced were superior to those of the vendors, and they having taken possession of the entire property under their mortgage, which possession was lawful between them and the vendors, if their superior rights could be terminated by after payment, which is not conceded, such payment not having been made, the vendors were not entitled to the possession of the goods at the time they brought suit.

d—It is not clearly seen how the rights of the vendors could be worked out and protected in a suit at law, and equity would seem to be the proper forum in which to adjudicate upon and protect the rights of the parties, under whose guidance the goods claimed by the vendors may be identified, separated, and applied to the discharge of the debt, namely, the new consideration for which they were security, and the surplus handed over to the owners, in case the whole security should be more than sufficient to discharge the debt for which it was pledged.

e—It is possible that in some cases, where the new consideration is inconsiderable in comparison with the value of the goods out of which the owner was defrauded, and was money advanced, the defrauded vendor might, by tendering such new consideration to the mortgagee, relieve the property from the operation of the rule before referred to, and entitle him to bring his action therefor in a court of law. *Zucker v. Karpeles*, 414-416.

CLAIM OF OWNERSHIP—See ADVERSE POSSESSION (2).

COMBINATION TO CONTROL PRICES—See SALE (1).

COMMISSIONS—See DIRECTING VERDICT (2); EVIDENCE (44).

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CONDUCT OF COUNSEL—See PRACTICE IN CIRCUIT COURT (3, 6, 10).

CONSIDERATION.

In a suit by a daughter to recover from her uncle for the care and board of her mother, the court instructed the jury that they must find that the defendant received a valuable consideration from the plaintiff, which induced him to make the contract relied upon, as a naked promise was void on general principles of law. The court also instructed the jury that if they should find that the defendant was desirous of aiding in the support of his sister, and agreed with the plaintiff to pay her the charges and expenses of such support above the pension she was receiving, the plaintiff could recover what such support was reasonably worth. Error is assigned upon the first portion of the charge. And it is held that the second instruction, taken in connection with the first, sufficiently explained what would be a consideration for the promise of the defendant. *Howe v. Hyde*, 91.

See CHATTEL MORTGAGE (4); DEED (1); EVIDENCE (7).

CONSTITUTIONAL LAW.

1. Act No. 228, Laws of 1889 (3 How. Stat. §§ 9613*b*—9613*g*), providing for indeterminate sentences, and the disposition, management, and release of criminals under such sentence, is unconstitutional. *People v. Cummings*, 249.
2. The object of Act No. 512, Local Acts of 1887, which makes it unlawful to take, catch, or kill any fish in Klinger lake with spear, net, grap-hook, or by use of jacks or artificial light of any kind, or any kind of fire-arms or explosive material, or other device, except by hook and line, is clearly expressed in its title, namely, "An act to prevent the destruction of fish in Klinger lake." *People v. Miller*, 383.
3. It was held in *Insurance Co. v. Raymond*, 70 Mich. 485, unnecessary to indicate in the title of a law any punishment for the violation of its provisions. *Id.*
4. Act No. 150, Laws of 1881 (How. Stat. § 978), entitled "An act to provide for the enrollment of contributing members in each company and battery of State troops," and which exempts such members from jury duty, is constitutional. *Hall v. Burlingame*, 488.

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CONTRACT.

1. After plaintiff had entered upon the performance of a contract made with a contractor of defendant to do some dredging, one of the defendant's officers said to him that the defendant would keep enough of the contractor's money back to pay plaintiff for the work he would do dredging, and another officer remarked that it was pretty early to do that, to which the first officer responded, "We have to do the work; we cannot let it be delayed,"—which promise or guaranty is held to come within the statute of frauds. *Dupuis v. Improvement Co.*, 103.
2. The letters and telegrams set forth in the opinion are held not to have made a completed contract for the sale by defendant to plaintiffs of 100 shares of mining stock, the manner and place of delivery being left open for future negotiation between the parties. *Topliff v. McKendree*, 148.
3. The owner of the minutes of pine lands agreed in writing to select therefrom and locate in the name of a second party 5,000 to 10,000 acres, the second party agreeing to furnish the necessary means, and to give to the first party an undivided one-fourth part of all lands so selected and located, which agreements were fully performed except the conveyance to the first party of his interest in the lands located. And it is held that the contract did not declare a trust; that upon its face it had simply the elements of an executory contract; and that it was the duty of the second party to make such conveyance, and until it was made the law would imply that he held the title to the interest agreed to be conveyed in trust for the party entitled to such conveyance. *Ripley v. Seligman*, 178.
4. While neither party to such a contract might be able to enforce specific performance of the respective agreements to select and to furnish the money with which to locate the lands, either would have a remedy at law for damages for non-performance of the contract. *Id.* 179.
5. A written contract by which the owner of the minutes of pine lands agrees to select therefrom and locate from 5,000 to 10,000 acres in the name of his co-contractor, who agrees to furnish the necessary means for that purpose, and to give to the first party an undivided one-fourth part of the lands so located, which contract has been executed except as to

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CONTRACT—Continued.
the conveyance of said interest, creates an equitable interest in the land which vests in said first party, and cannot be released or surrendered except by writing signed by him, or by the act or operation of law. *Id.* 180.

6. An agreement by the second party to such a contract to furnish the money to pay the expenses and taxes is held to have been for the benefit of both parties, it not being a part of the consideration moving to the first party, and in a suit by him to enforce the trust arising out of said contract he should be charged with his proportion of the taxes paid. *Id.*

7. Where an order is given for a monument with certain inscriptions, among which is the name, date of death, and age of the deceased, and the manufacturer omits from the inscription the age, the orderer has the right to reject the monument, and, in the absence of an agreement that the manufacturer may remedy defects or furnish a new monument, he can do neither, the contract being ended by notice of such rejection. *American White Bronze Co. v. Gillette*, 231.

8. Where suit is brought to recover for labor performed under an express contract, and the parties differ only as to the price agreed to be paid, the plaintiff cannot abandon the contract, and recover what the labor was reasonably worth. *Shaw v. Armstrong*, 311.

9. Where, in such a case, the plaintiff is informed by the defendant, on making the first monthly payment, that he claims that the labor is to be performed at a less price than that claimed by the plaintiff, plaintiff cannot go on with the performance of the work on the theory that there is no contract, and that he is entitled to recover its reasonable worth. *Id.*

10. A contract giving a party the exclusive agency in a specified territory for the sale of an article controlled by the other party to the contract is not void for want of mutuality because it does not expressly provide that the agent shall hold out the goods to the public, and further the interests of the principal; such agreement being implied from the acceptance of the agency and entering upon the same. *Mueller v. Mineral Spring Co.*, 390.

See LAND CONTRACT; MUNICIPAL CORPORATIONS (6, 7); PARENT AND CHILD.

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CONTRACT WITH TEACHER—See SCHOOLS AND SCHOOL-DISTRICTS (7, 9).

CORPORATIONS.

1. After the passage of Act No. 6, Laws of 1889, authorizing the incorporation of associations for exposition and exhibition purposes, the defendant became a subscriber to a preliminary subscription paper, by which the signers agreed to subscribe for and take stock to the amount set opposite their names in a corporation which the agreement stated they believed should be organized, with a capital stock of *at least* $250,000, for the purpose of purchasing suitable grounds and erecting suitable buildings thereon, upon a plan similar to the Buffalo Exposition. The subscriptions were not to be binding unless the sum of $100,000 was subscribed within 60 days from the date of the agreement, which condition had been complied with prior to the passage of said act. The association was organized after defendant had made his subscription, with a capital stock of $500,000, of which only $254,500 was subscribed. The articles of association were not signed by the defendant, nor did he subscribe for any of the capital stock except as before stated; but he attended a meeting called to select a site after such incorporation, and voted stock to the amount of his subscription. Grounds were purchased and buildings erected, and a fair held in the fall of 1889, and a dividend of five per cent. upon the subscribed capital was declared. Assessments were duly made upon the subscribers to the subscription paper and to the articles of association for the full amount of their subscriptions, which assessments were based upon the amount actually subscribed, and not upon the entire capital of $500,000. The defendant was notified of the assessments, which he refused to pay, and after tendering him a certificate of stock for the amount of his subscription, and demanding its payment, which was refused, as also the acceptance of the certificate, a suit was brought, in which the plaintiff declared specially upon the agreement of the defendant to subscribe for and take $5,000 stock in the corporation, and averred its acceptance of said subscription, and that in reliance thereon it purchased the land and erected the buildings in accordance with the purpose of the corporation, and as a breach averred the neglect and refusal of the defendant to subscribe and take stock in the corpora-

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tion, and pay any sum or sums thereon, according to the form and effect of his said agreement, to which declaration the common counts in *assumpsit* were added. On the first trial the defendant introduced no testimony, and a verdict was directed in his favor, and the decision of this Court reversing the judgment entered thereon is reported in 88 Mich. 386. A second trial has been had, and, in reversing the judgment entered upon a verdict directed in favor of the plaintiff, the majority of the Court (LONG and MORSE, JJ., dissenting, and adhering to the former opinion) hold:

a—That Act No. 6, Laws of 1889, does not authorize associations organized under it to proceed to the transaction of business until the entire capital stock is subscribed; neither does it authorize or provide for any preliminary subscription for stock, nor for any subsequent subscription to the capital stock.

b—That as a general rule, where the capital stock and the number of shares are fixed in the recorded certificate, no valid assessments or calls can be made on the subscriptions until the whole capital stock is taken, unless there be a provision to that effect in the certificate or in the general law under which the corporation is organized, and in such case the subscriptions may be considered to that extent conditional.

c—That the contention of the plaintiff, that it was the intent of the subscribers to the preliminary subscription paper that a corporation with a capital stock of $250,000 would contain sufficient capital for the purpose for which the corporation was to be formed, which sum was subscribed at the time of its organization, and that the subscribers were willing to be bound to pay their subscriptions if $100,000 was subscribed within the 60 days, although the whole capital stock was not subscribed, is untenable; that their agreement must be read in the light of what the act required should be done to legally organize the corporation; and that there is nothing upon the face of the agreement which would render the defendant liable to pay for his subscription unless the whole authorized capital was subscribed.

d—That, while the defendant was estopped by his conduct from denying that he was a stockholder and member of the corporation, he was not liable to be assessed upon his

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CORPORATIONS—Continued.

stock unless he had waived the condition that the whole capital stock must be subscribed before such assessment could be legally made; that the burden of proof was upon the plaintiff to establish such waiver, which would depend upon the knowledge which defendant had that the stock had not all been subscribed, and upon his acts and conduct tending to show that he was willing and desirous that the main purposes of the corporation should be proceeded with without such stock being subscribed, which facts were not conclusively established on the trial; and that the whole testimony tending to show such waiver should have been submitted to the jury. *International Fair, etc., Ass'n v. Walker*, 62-64.

2. The following propositions are summarized from the opinion of Chief Justice CHAMPLIN:

a—No one can legally exercise a franchise of a corporation unless authorized so to do by the Legislature.

b—All of the powers possessed and privileges enjoyed by corporations are conferred by their charters, or by the statute authorizing their formation under general laws.

c—When the statute points out a method of organizing a corporation under general laws, that method must be pursued by a substantial compliance with the statute, and none other can effect a legal incorporation.

d—In stock corporations organized for trade, manufacture, or other objects where it is expected that the investment of the capital stock will yield a return of profits by way of dividends or otherwise, the authorized capital stock is the life-blood of the corporation, and the means through which the object of organization is to be accomplished; hence said stock, and the shares into which it is divided, are required to be fixed by the articles of association.

e—Two classes of corporations are authorized under the Michigan statutes,—one on the basis of capital stock as a foundation for membership, in which each share represents a voting unit, and the other not upon a stock basis, but in which the membership is personal, and the individual represents the voting unit. The first class comprises all corporations organized for gain or profit upon the capital invested, and may be subdivided into two classes, the first of which is composed of all those corporations whose capital stock is

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CORPORATIONS—Continued.

required to be fixed in the articles of association, and the shares specified, and where the whole capital stock must be subscribed before they are fully organized and competent to do business.

f—Public policy, as well as the rights of individual members of the corporation, requires that the full amount of capital stock fixed in the law or articles of association should be subscribed when the corporation is formed, unless by special permission of the Legislature it may be afterwards subscribed.

g—Such capital stock is a trust fund for the protection of creditors and those dealing with the corporation, and, to be a fund at all, it must be subscribed; and, if fully paid in, public policy and the rights of stockholders require that such funds should not be diverted from the object to accomplish which the corporation was organized.

h—Such capital, though subscribed, need not all be paid in, but the amount to be assessed is usually left to the discretion of the board of directors, who may call in the capital in such installments as to them may seem best, and the statutes usually confer this authority.

i—It is this subscribed unpaid capital which the subscribers owe to the corporation that constitutes a trust fund in favor of creditors for the payment of the debts of the corporation; but, if the capital is not actually subscribed, there is no security to that extent for the creditors. *Id.* 64, 65.

3. How. Stat. § 8086, as amended by Act No. 266, Laws of 1889, authorizing the service of a writ of garnishment upon any officer or agent of a foreign corporation found within this State, is not confined to a *general* agent of the corporation. *Shafer Iron Co. v. Circuit Judge*, 464.

4. How. Stat. § 8061, requiring a garnishee to appear before a circuit judge or circuit court commissioner and submit to a personal examination touching his liability as garnishee, does not apply to a foreign corporation, when summoned as garnishee. *Id.*

5. A circuit judge has no power to order any or all of the officers of a foreign corporation, against which garnishment proceedings are pending, to appear and bring before him the books and papers of the corporation, and submit to an

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CORPORATIONS—Continued.
examination on oath concerning its liability as such garnishee. *Id.*
See MORTGAGE (3).

CRIMINAL LAW.

1. A depot master, who, acting under the direction of the railroad company, in attempting to enforce a valid rule assigning places upon its grounds to hackmen and excluding others not assigned thereto, uses no more force than is necessary to eject a hackman from a place to which he has not been assigned, and which he is unlawfully attempting to occupy and hold, is not guilty of an assault and battery. *Cole v. Rowen*, 219
2. Act No. 228, Laws of 1889 (3 How. Stat. §§ 9613*b*-9613*g*), providing for indeterminate sentences, and the disposition, management, and release of criminals under such sentence, is unconstitutional. *People v. Cummings*, 249.
3. Actual knowledge and intent to defraud must be shown in order to warrant the conviction of a respondent under Act. No. 9, Laws of 1887 (3 How. Stat. § 9209*d*), which makes it a criminal offense to give knowingly a false pedigree of any animal, with intent to defraud. *People v. Umlauf*, 274.
4. A respondent cannot be convicted of assault and battery under an information charging him with the statutory offense of "assault with intent to do great bodily harm less than the crime of murder," but not charging a battery; nor can the information be amended, after verdict and before judgment, so as to include such latter charge. *Turner v. Circuit Judge*, 359.
5. Zeal in a prosecuting attorney is entitled to the highest commendation, but it must be exercised within proper limits. *People v. Cahoon*, 456.
6. Juries very properly regard the prosecuting attorney as unprejudiced, impartial, and non-partisan; and insinuations thrown out by him regarding the credibility of witnesses for the defense are calculated to prejudice the respondent. *Id.*
7. The following questions asked of respondent's wife by the prosecuting attorney on cross-examination, she being the only person present at the affray except the parties thereto, namely:

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CRIMINAL LAW—Continued.

a—Is it not a fact that you were not there at all?

b—Has this been written out?

c—Is it not a fact that you and your husband have concocted this whole story?

d—You have been a witness for your husband in every lawsuit he has had, have you not?

—Are held to have reflected upon the character of the witness, and to bring this case within the rule laid down in *Sullivan v. Deiter*, 86 Mich. 404. *Id.*

8. Remarks by a prosecuting attorney, accompanying a request to swear impeaching witnesses whose names are not indorsed on the information, calculated to impress the jury with the belief that the people are prepared to impeach the respondent by his own neighbors, and that, while the procurement of witnesses for that purpose is usually difficult, it is an easy mattter in his case, are indefensible, as is his action in recalling the respondent after the refusal of the court to admit the proposed impeaching testimony, and questioning him as to whether he had not been impeached in other cases, and if, in a number of other instances, his neighbors had not been brought into court for the purpose of impeaching him. *Id.* 457.

CROSS-EXAMINATION—See PRACTICE IN CIRCUIT COURT (7).

DAM—See HIGHWAYS (1, 2).

DAMAGES.

1. Where the performance of the work sued for and its value are undisputed, and the controversy is whether the defendant originally agreed to pay for the labor, or *verbally* agreed to become security up to a certain sum for third parties, at whose mill it was performed, the plaintiff, if entitled to a verdict, should recover the full amount of his claim. *Mitchell v. Beck*, 342.

2. The measure of damages for the breach of a contract by which the plaintiff was made sole agent in certain territory for the sale of mineral water of which the defendant was the sole proprietor, and which it agreed to furnish to the plaintiff at an agreed price, is the profits which the plaintiff might have realized on sales if the defendant had performed the contract. *Mueller v. Mineral Spring Co.*, 390.

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DEED.

1. A clause in a quitclaim deed of an *undivided interest* in lands, purporting to be executed in consideration of the sum of one dollar and of love and affection, which declares that the conveyance is made upon the express condition that the grantee shall pay or cause to be paid, in due season, all taxes assessed upon the *whole* of a portion of the lands described in the deed, is held to be a condition subsequent, and not the valuable consideration referred to in How. Stat. § 5572, under which no implied or resulting trust can be alleged or established to defeat or prejudice the title of a purchaser for a valuable consideration. *Ripley v. Seligman*, 179.
2. A father executed a deed of three city lots to his son, and handed it to him, at the same time stating that he would not like to see the deed on record until after his death, to which the son assented, and handed the deed back to his father, who retained possession of the lots, on which were two houses, in one of which he lived, and rented the other and collected the rents. The father subsequently destroyed the deed, and conveyed two of the lots to the son and the other to a foster granddaughter, who at his request had left an employment where she was earning fair wages, and come to his house, after the death of his wife, and taken care of him for two years, which care was continued until his death, a year and a half after the execution of the deed. And it is held that the first deed was not delivered, and conveyed no title to the son, and that the consideration for the deed to the granddaughter was ample, and the deed valid. *Schuffert v. Grote*, 650.

See EVIDENCE (7); MORTGAGE (7); PARENT AND CHILD (3).

DEFAULT—See PRACTICE IN CIRCUIT COURT (2).

DEFINITIONS.

1. Laches. 180 (12).
2. Good-will. 474 (*a*).
3. Market price. 15-17.

DELIVERY—See DEED (2).

DIRECTING VERDICT.

1. A defendant who has not rested his case cannot except to the refusal of the court to direct a verdict in his favor. *Kelso v. Woodruff*, 299.

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DIRECTING VERDICT—Continued.

2. The question whether plaintiff was the procuring cause of the sale on account of which he seeks to recover a commission of $100, which he claims the defendant agreed to pay him if he found a purchaser, is held to have been, under the evidence, a question of fact for the jury. *Id.*

DOCKET—See EVIDENCE (1).

DRAINS.

Sections 4 and 7 of chapter 2 of the drain law of 1885 (3 How. Stat. §§ 1740*a*7, 1740*b*) are construed:

a—As giving to the county drain commissioner concurrent jurisdiction with the township drain commissioner of drains *entirely* within the latter's township.

b—As prohibiting the spreading of taxes for the construction of drains by such commissioner until all of the records thereof required to be made by him are filed with the county clerk. *Conley v. Supervisors of St. Clair Co.*, 245.

ELECTIONS.

1. Certain provisions of Act No. 190, Laws of 1891, entitled "An act to prescribe the manner of conducting and to prevent fraud and deception at elections in this State," and made applicable to municipalities by Act No. 194, Laws of 1891, are construed as follows:

a—Where the vignette adopted by a political party, and forwarded to the election commissioners with the names of the candidates nominated, combines within it the name of the party or political organization which the committee forwarding it represent, it is unnecessary to put another heading below it.

b—When the call for a convention of a political party results in the holding of two nominating conventions, it is not the province of the board of election commissioners to determine which convention represented the *regular* nominating convention of the party, but it is their duty to place upon the ballot the names of the candidates certified to them by the committee of either branch of the party represented by the two conventions; and if the name of a party shall be certified by each of the two committees, it is the duty of the commissioners to print the names so certified without further addition or distinctive designation than such as is

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ELECTIONS—Continued.

contained in the certificates so furnished. *Shields v. Jacob*, 164.

2. It is not the duty of the board of election commissioners provided for by Act No. 194, Laws of 1891, to print upon the ballot the name of a candidate for alderman not selected by any assemblage or meeting of electors of his ward. *Chateau v. Jacob*, 170.
3. The term "all other school officers," as used in Act No. 18, Laws of 1885 (3 How. Stat. § 5132), which provides "that in the election of trustees, and all other school officers, the person receiving a majority of all the votes shall be declared elected," includes the director, moderator, and assessor of primary school-districts. *Cleveland v. Amy*, 375.

See MUNICIPAL CORPORATIONS (8).

ENCROACHMENT—See HIGHWAYS (4).

EQUITY JURISDICTION—See BILL FOR ACCOUNTING.

EQUITY PLEADING.

1. For a misjoinder of parties defendant those only can demur who are improperly joined. *Sweet v. Converse*, 1.
2. The terms of a demurrer should suggest the errors complained of, and, when two defendants join in a demurrer for want of equity solely, neither can be allowed to raise a question not available to both. *Id.*
3. Where a judgment creditors' bill alleges that the mortgagor and a receiver appointed in the foreclosure suit fraudulently conspired together to enable the mortgagee to get possession of all of the mortgagor's assets for a nominal consideration, and that the conspiracy was successful, it is not necessary to aver that as a consequence there were no assets with which to pay complainant's judgment, or that the conduct of the defendants operated as a fraud upon other creditors, or that the intent was to defraud them. *Id.*

ESTATES OF DECEASED PERSONS.

1. An administrator *de bonis non*, appointed on the removal of the original administrator and sole heir of the deceased for refusing to pay a claim of $1,081 allowed against the estate, obtained a license to sell real estate upon a petition alleging that it was necessary to make such sale to raise the

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ESTATES OF DECEASED PERSONS—Continued.

sum of $1,200, or thereabouts, to pay the just debts and charges against the estate, and that no personal estate of the deceased had come into his hands, which allegations were supported by the proofs taken on the hearing. And it is held that the petition and proofs fully met the requirements of the statute authorizing such license and sale when the personal estate in the hands of an executor or administrator is insufficient to pay all of the debts of the deceased, and the charges of administration. *Beniteau v. Dodsley*, 152.

2. The license to sell was granted within four years and six months from the appointment of the original administrator, but more than that period would elapse before a sale could be made thereunder, and it was objected by the heir that the probate court lost jurisdiction to grant the license at the end of four years from such appointment, under the ruling in *Hoffman v. Beard*, 32 Mich. 218; which case the Court hold does not apply to the one at bar, and that under the circumstances the heir cannot be heard to raise the objection. *Id.*

3. A widow is entitled as a matter of *right* to her reasonable sustenance out of the estate of her deceased husband for one year after his death, under How. Stat. § 5755; and, in case he died *testate*, the probate judge may use his discretion as to continuing the allowance during the progress of the settlement of the estate, but never for a longer period than until the widow's share is assigned to her. *Pulling v. Durfee*, 387.

4. It is the duty of a widow who applies for an allowance out of her husband's estate *after* the expiration of the statutory year to make some showing of her needs and circumstances, if required by the probate judge. *Id.* 388.

5. Equity has jurisdiction of a suit by one executor against his co-executor, who has received all of the statutory commissions, for an accounting and division of such commissions. *Speirs v. Wisner*, 614.

6. There is no rule of law or equity which declares that co-executors, without regard to the time spent, responsibility assumed, or services rendered, are entitled to an equal *pro rata* share of the statutory fees. *Id.*

7. One of three executors, who managed the business and had the responsibility of administering the estate, received the

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ESTATES OF DECEASED PERSONS—Continued.

statutory commissions. One of his co-executors resided in another state, and the other, the widow, who was absent much of the time during the settlement of the estate, obtained an assignment from the non-resident executor of his claim to such commissions, and filed a bill to compel the managing executor to pay her two-thirds of the commissions he had received, which is dismissed, the Court holding that, under the facts of the case, complainant is not entitled to the relief prayed for. *Id.*

EVIDENCE.

1. A justice's docket showed that a summons was made returnable September 8, and returned personally served Sept. 1, and that a judgment was rendered Oct. 8, but failed to show any adjournment of the case. The several dates were entered in the left-hand margin of the docket, and ditto marks appeared under the abbreviation "Sept.," over which marks the abbreviation "Oct." had been written as the date of the judgment entry, the marks appearing in the letter "O." And it is held competent to explain by the testimony of the justice the appearance of the entries; and that if the judgment was actually rendered on September 8, and that day entered at the time, and the abbreviation "Oct." afterwards written over it, either by mistake or design, such facts might be shown by the justice who made the entries. *Damm v. Gow*, 99.
2. It is competent for the plaintiff in a negligence case to show that no conductors or trainmen were at the platform when she alighted to assist passengers in alighting, not as a ground of recovery, but as showing the surroundings. *Sherwood v. Railway Co.*, 108.
3. The testimony of the physicians who examined plaintiff's limb and broken bone, as to the *details* of such examination, is competent. *Id.*
4. How. Stat. § 7545, prohibiting the opposite party, in a suit "prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person." from testifying to facts which, if true, must have been equally within the knowledge of the deceased, is construed as follows:

a—The word "assigns" is used in its legal sense, and sig-

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nifies a person to whom any property or right is transferred by a deceased person in his life-time.

b—The statute is broad enough to cover *successive* transfers, or where the controversy depends upon the acts or dealings with the property of the deceased in his life-time; and any one who is called upon to prosecute or defend some interest which is affected by the act or agreement of the deceased party through whom he claims may invoke the protection of the statute.

c—The case of *Twiss v. George*, 33 Mich. 253, in which it was held that the statutory prohibition did not extend to controversies with third persons acting in their own right as purchasers during the life-time of the deceased, and not taking by *post mortem* estate, arose under the statute as it read before the 1875 amendment, and cannot be taken as an exposition of the present law.

d—While the representatives of a deceased person cannot waive the provision of the statute (*McHugh v. Dowd Estate*, 86 Mich. 412), the decedent's assigns may do so.

e—In applying the statute, care should be observed in distinguishing between matters equally within the *knowledge* of the deceased and matters within his *information*, as it is only as to the first that the opposite party is not permitted to testify.

f—The statute was not intended to exclude testimony concerning facts capable of proof by documentary evidence accessible to both parties, as, for instance, the dates or contents of written instruments of a public character, where such testimony is not excluded under other rules governing the admission of testimony. *Ripley v. Seligman*, 177.

5. There is no impropriety in a plaintiff refusing to answer questions whether he has made any arrangements with any person to carry on the suit for a share of what might be recovered therein, or by which any other person than himself is to pay the whole or any part of the expenses of the litigation, such inquiries being objected to by his counsel, who instructs him not answer them. *Id.* 178.
6. Implied or resulting trusts may be established by proving the transaction out of which they result or are implied, and such proof may be by parol testimony. *Id.* 179.
7. The considerations recited in deeds are not sufficient evidence

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EVIDENCE—Continued.

to show the consideration upon which a party can rely when he has the burden of proving that the consideration paid was valuable in a suit between the grantee and third persons. *Id.*

8. Plaintiff was thrown from his wagon while driving along a highway in defendant township which had been in use for upwards of 15 years. It had been turnpiked so as to form a road-bed from 14 to 16 feet in width at the place where the accident occurred, which was caused by the plaintiff driving onto a small log, one end of which was firmly imbedded in the earth, while the other was exposed to view. Plaintiff's leg was broken, and he sustained other injuries, for all of which he recovered a judgment of $700 damages against the township, which is reversed for the error in permitting plaintiff to show that an overseer of highways of the road district in which the highway was situated cut off the exposed portion of the log *after* the accident, the jury not being instructed that such fact could not be used as an admission on the part of the township of the dangerous character of the obstruction, and that the road was not reasonably safe for travel by reason of its existence. *Langworthy v. Township of Green*, 207.

9. The admission of the following testimony offered by plaintiff was not error:

a—The result of a measurement, made four weeks after the accident, of the size and height of the log from the roadway; it being firmly imbedded in the earth, and the accompanying evidence negativing the probability of a change of situation.

b—That plaintiff had to hire a man to do his farm work during the term he was laid up on account of the injury.

c—The opinion of the attending physician as to the probable effects of an injury of the character of that sustained by the plaintiff.

d—The testimony of two farmers who had worked with plaintiff on the farm in the hay-field and at other kinds of labor, both before and after the accident, as to his ability to do as good a day's work since his injury as before.

e—The statement of the plaintiff that he was driving as carefully as a man could, followed by a full description of the manner in which he was driving; the rule being that,

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EVIDENCE—Continued.

where the court or jury can make their own deductions, they shall not be made by witnesses, but, where the witness gives fully and succinctly the facts upon which he bases his conclusion, there is no presumption of prejudice. *Id.*

10. Plaintiff having testified that he had a conversation with the highway commissioner after the accident, and that he did not state to him that his horses got scared at a calf, and did say that he claimed damages against the township, it was competent to ask him on cross-examination what claim he made to the commissioner; but the error committed in excluding the proffered testimony was cured by allowing defendant afterwards to go fully into the matter. *Id.* 208.

11. The rejection of the following testimony offered in behalf of the defendant was not error:

a—That the witness had never heard or known of any one being injured on the obstruction before the accident to plaintiff.

b—Of plaintiff's failure to claim damages against the township prior to bringing suit, which was brought within 15 months after he met with the accident.

c—The opinion of witnesses whether the highway at the point where the obstruction existed was dangerous, and whether the log was a dangerous obstruction; these questions being for the jury.

d—How the portion of the road where the accident occurred compared with other portions of the same road in the same township.

e—Plaintiff's manner and method of driving horses, such manner of driving on other occasions being inadmissible to establish his negligence at time of the accident.

f—Whether plaintiff was a drinking man,—whether he was addicted to the use of liquors; the material question being his condition as to sobriety at the time of the accident. *Id.*

12. An unregistered account of the strain of an animal, especially where it, as well as its ancestry, has changed hands a number of times, must necessarily be based upon hearsay. *People v. Umlauf*, 274.

13. *Actual knowledge* and intent to defraud must be shown in order to warrant the conviction of a respondent under Act No. 9, Laws of 1887 (3 How. Stat. § 9209*d*), which makes it

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EVIDENCE—Continued.

a criminal offense to give knowingly a false pedigree of any animal, with intent to defraud. *Id.*

14. It is reversible error to refuse to permit the president of a corporation to testify, in a suit brought against the corporation by attorneys who claim to have been employed by other of its agents in a certain suit, why he did not employ counsel in the suit after being advised of its progress and of plaintiffs' appearance as attorneys therein, he denying their alleged employment or the authority of the said agents to employ them, and claiming it as his prerogative to make such contracts. *DeLong v. Booming Co.*, 282.

15. Where, in a case involving the mental competency of a grantor, plenty of witnesses are found to testify upon both sides of the controversy, and the opinions seem evenly balanced, courts will look to the circumstances surrounding the transaction, its fairness, the history and character of the grantor, and the probability that one in the possession of his faculties would make a transfer of his property in a given case. *Hemphill v. Holford*, 293.

16. Evidence of the amount of mineral water sold by a firm to whom the defendant transferred the exclusive agency for the sale of the same in a certain territory in violation of a contract giving the plaintiff such agency is competent as bearing on the question of damages. *Mueller v. Mineral Spring Co.*, 390.

17. Agency cannot be established by testimony as to the statements of the alleged agent relating to the *fact*, or to the possession of any of the *indicia*, of agency. *Henneberger v. Matter*, 396.

18. It cannot be assumed that the sale of a patent is fraudulent, or that, because it afterwards turns out to be of little or no value, that fact alone indicates fraudulent intent in the vendor. *Id.*

19. While it is true that fraud need not be shown by direct proof, and may be, and generally is, proven by inference from facts and circumstances, yet it cannot be presumed from mere suspicion, nor from facts or circumstances which are entirely consistent with an honest purpose. *Id.*

20. The evidence in this case is held insufficient to support the finding of the court that the plaintiff was not a *bona fide*

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EVIDENCE—Continued.

purchaser of the note sued upon; there being no competent testimony to support the further necessary finding that plaintiff's alleged agent had possession of plaintiff's stock at the time of the sale of certain other stock to the defendant, or during the negotiations which lead up to its sale, and the giving of the note in payment for the same. *Id.*

21. In a suit involving the question whether a horse was afflicted with the disease known as "blind staggers" or not, a witness who saw the horse while suffering from an attack of said disease, as claimed, and who testifies to having had considerable experience with horses, and to having seen several who had the disease in question, which is common among horses, and with the symptoms of which he is familiar, is competent to give an opinion upon the disputed question. *People v. Bane*, 453.

22. A respondent on trial for cruelly mutilating a horse, and whose defense was that the animal had the blind staggers, for which bleeding was the usual remedy, called as a witness a veterinary surgeon, who, having stated on cross-examination that the respondent had described to him how the horse acted, was asked to give his opinion from the statements made whether the horse had the blind staggers or not. And it is held that it would have been proper to have given to the witness the conduct of the horse as stated by the respondent, and to have asked him if, in his opinion, the horse was afflicted with the disease; and that it was also competent to predicate the question upon the actions of the horse as described to the witness by the respondent. *Id.*

23. A general agreement of one partner on the dissolution of the firm to assume and pay all of the firm debts, without further specification, is not admissible in evidence on the part of the plaintiff in a suit subsequently brought against the firm to recover for money borrowed by the other partner for the use, as claimed, of the firm, which is denied by the partner making said agreement, who, as conclusively shown by the evidence, never recognized plaintiff's claim as a firm debt. *Coller v. Porter*, 549.

24. In a suit against a firm to recover for money loaned to one of the partners, the other partner defended on the theory that the loan was for the individual use of the partner making it, with the knowledge of the plaintiff, while the plaintiff

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EVIDENCE—Continued.

contended, and the testimony on her behalf tended to show, that it was necessary to use the money in the firm business, and that it was borrowed for that purpose. And it is held that the plaintiff was properly asked on her direct examination if she knew of any attempt on the part of the partner who made the loan to defraud his copartner, and, if he had taken advantage of him in any way, whether she had been a party to such action in any way, or had knowledge of it. *Id.*

25. It appeared on the trial that the partner who made the loan was using the firm money for his individual use without charging it on the books; that he was also a borrower; that although the manager of the business, he kept the firm books in such a condition as to prevent his copartner from knowing what he was doing; and that, if not actually engaged in defrauding him, he was grossly negligent, and acted in bad faith towards him in the conduct of the business. And it is held that said copartner was entitled to a searching cross-examination of his copartner when sworn in behalf of the plaintiff, and to inquire fully into his financial condition and transactions from the commencement of the business, and his intentions towards him, and to inquire if he did not know at the time he went into said business that he had no money with which to enter the same. *Id.* 550.

26. The burden of proof is upon the contestants of a will to establish undue influence and incompetency to make it, and it is incumbent upon them to produce positive proof in support of either one or both of these propositions to entitle them to a verdict. *Prentis v. Bates*, 567.

27. Testimony that a testatrix talked more than some others; that she seemed erratic; that she talked upon various subjects; that she changed her mind as to the cost of a house which she was building; that she wanted different arrangements made from what the architect thought proper or consistent with good building; that she once got angry and screamed; that she scolded the men who were at work, changed her mind about colors, and became enraged and angry at those who were building her house,—is incompetent, and does not tend to show her insanity or testamentary incapacity. *Id.* 568.

28. Testimony that a sister of a testatrix became insane, and

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EVIDENCE—Continued.

that her niece, at the age of 34, was sent to an asylum for treatment, is incompetent as tending to show her incompetency to make her will; no insanity being shown in any of her ancestors, and that of her sister being attributed by the physicians in charge of her case at the asylum to disease, and the characteristics of the malady in her sister and niece being in no respect similar to those claimed in her case. *Id.*

29. A superintendent of an insane asylum, whose knowledge of a former inmate is derived solely from her record appearing upon the books of the asylum from the time of her admission until her death, is not competent to give an opinion as to what must have been her condition during the period of her confinement, his proposed answer being based upon the absence from the record of those things which he says would undoubtedly have been noted if they had existed. *Id.*

30. Instances of forgetfulness alone are no evidence of incompetency in a testator to make a will, nor are they a sufficient basis for expert testimony on the question of his sanity. *Id.* 569.

31. A hypothetical question which, while mentioning some things which would possibly be evidence of some mental derangement, refers to facts which, standing alone or in connection with other things, have no tendency to show insanity or incompetency in a testator at any time, is incompetent. *Id.*

32. Contestants of a will will not be permitted to introduce contradictory evidence upon a given point, and then base hypothetical questions upon the theory that some of their witnesses are correct and others mistaken, or that some have testified truthfully and others falsely. *Id.*

33. It is eminently unfair, in a case involving the contest of a will on the ground of the mental incompetency of the testator to make it, to select a few facts which tend naturally to show competency and sanity, and ask an expert witness, who has testified that in his opinion the testator was insane, whether such facts change his opinion. *Id.*

34. It requires a less degree of capacity to make a will than a contract, and when a testatrix is able to recognize her friends, relatives, and acquaintances, to make contracts, to know her property and tell what it is, and to take care of

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EVIDENCE—Continued.

and manage it, the law says she is capable of disposing of it by will; and medical experts cannot set aside the law by stating that those facts make no difference with their opinions. *Id.*

35. The competency of expert testimony, where questions of insanity are involved, is recognized by this Court in many decisions; but it must not be forgotten that in all cases of importance it is the unfortunate fact that we find these experts arrayed against each other. *Id.*

36. The object of expert testimony is to enlighten the jury upon those facts which need interpretation, and all facts should be excluded from hypothetical questions which the jury can interpret as well as the expert. *Id.*

37. No more important duty is devolved upon trial courts in cases involving expert testimony than to see that hypothetical questions are framed upon a proper basis, and to instruct the jury as to the consideration and weight they should give to them. *Id.*

38. A physician cannot testify to exclamations of pain of an injured person during an examination made in contemplation of a suit to recover damages for the injury, he being employed to make such examination to enable him to be a witness in said case, nor can he testify to exclamations and statements made upon an examination had after the commencement of said suit for a like purpose. *Jones v. Village of Portland*, 598.

39. It is not competent for a physician to testify to what the plaintiff in a negligence case told him as to how the injury was received for which suit is brought. *Id.*

40. In a suit to recover damages for injuries caused by a defective cross-walk, plaintiff's attorney offered to show the general unsafe condition of the walks of the village, and coupled the offer with the statement that the walks right along the street where the accident happened, for 80 rods, were not safe for a man who was in any way infirm, or for a lady, to pass along there at night without being injured or tripped up half a dozen times, which proposed testimony was objected to and excluded, but nothing was said by the court to the jury to correct the error in practice thus committed, which offer and statement are held reversible error. *Id.*

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EVIDENCE—Continued.

41. It was held in *Mayo v. Wright*, 63 Mich. 32, that a question to an expert witness is not objectionable on account of its length, but that it should be reduced to writing, and embrace the whole question in a connected manner. *Id.*

42. It is error to permit a witness to testify to his conclusions based upon facts in evidence before the jury from which they are as competent to draw a conclusion as is the witness. *Id.*

43. In order to show that the defendant in a flowage case had raised his dam, and thereby increased the flowage upon plaintiff's land to its injury, the plaintiff was permitted to show the relative capacity of a grist-mill operated by the defendant prior to said increased flowage, the grinding in which was done with stones, and of a roller-mill erected by the defendant 300 or 400 feet below the old mill, under the claim that the jury might infer that the increased capacity of the new mill was obtained by raising the dam. No proof was made that the defendant had used his full power when operating the old mill, and it appeared that he only owned one-half of the water-power created by the dam at that time, and had since then acquired the entire power, which was used in running the new mill; nor was it shown that the same wheels and machinery were in use, nor that it would require a greater head of water to run the roller-mill, nor that defendant had not acquired a greater head standing in the same level of the pond by locating the new mill further down the stream. And it is held that, in the absence of the necessary *data* raising the conclusion that the dam was necessarily raised when the capacity of the mill was increased, the evidence first referred to was misleading and entirely unreliable, and should not have been admitted for the purpose claimed. *Shearer v. Middleton*, 621.

44. Testimony tending to show that the plaintiff made a special agreement with the defendant that he should be paid a commission of two and one-half per cent. on whatever price certain real estate was sold for, if he was instrumental in bringing about the sale, and that he was instrumental in bringing about a sale for $45,000, and also what his services were worth in estimating the pine upon the land preparatory to a sale thereof, and that the defendant requested him to pro-

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EVIDENCE—Continued.

ceed and find a purchaser from time to time, which he did, if uncontradicted, entitles the plaintiff to recover. *McDonald v. Ortman*, 645.

See HIGHWAYS (4).

EXECUTORS AND ADMINISTRATORS—See ESTATES OF DECEASED PERSONS (5–7).

EXPERT TESTIMONY—See EVIDENCE (21, 22, 29, 30, 34–39).

FACTORS AND BROKERS—See DIRECTING VERDICT (2); EVIDENCE (44).

FINDINGS OF FACT.

The findings of fact of the trial judge will not be disturbed where the testimony in the record tends to support the facts found. *Snody v. Shier*, 304.

FIRE—See NEGLIGENCE (6–10).

FIRE INSURANCE.

1. A stipulation avoiding an insurance policy if the property be or become incumbered by a chattel mortgage, unless otherwise provided by agreement indorsed upon or added to the policy, is reasonable and valid. *Olney v. Insurance Co.*, 94.
2. The execution by one partner of a chattel mortgage upon the partnership property for his individual benefit works such a change in the *interest* of the firm as will avoid the policy, under a stipulation that it shall be void if the property be or become incumbered by a chattel mortgage, unless otherwise provided by agreement indorsed upon or added to the policy, or if any change other than by the death of the insured takes place in the *interest*, title, or possession, whether by legal process or judgment, or by the voluntary act of the insured, or otherwise. *Id.*

FLOWING LANDS—See EVIDENCE (43).

FORECLOSURE OF MORTGAGE—See MORTGAGE (4–6); RECORDING LAWS (1).

FOREIGN CORPORATION—See CORPORATIONS (3–5).

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FRAUD.

1. The rule that a right of action for fraud is non-assignable has no application to an assignment of something which is in itself tangible and capable of delivery, and involving a right of property, but in such a case the right to whatever remedy the assignor has follows the assignment. *Sweet v. Converse*, 2.
2. The following general propositions are summarized from the opinion of Mr. Justice McGRATH:

a—Acts are constructively fraudulent as to creditors when injurious to their rights, without of necessity involving *actual* fraud or an intent to defraud.

b—If the conduct of a party is such as, in its tendency and result, to operate to defraud others, it will be deemed fraudulent, although no such purpose was intended.

c—Where there is *actual* fraud in obtaining the property of an insolvent, the party acting fraudulently will be presumed to have intended the results which followed that conduct.

d—A fraud upon a debtor by one creditor, whereby such creditor is enabled to absorb *all* of the debtor's property, to the exclusion of other creditors, operates as a fraud upon them, and they have a right to complain, especially where the debtor is in collusion with the overreaching creditor.

e—A secured or an unsecured creditor has no right to so fraudulently use his security or judgment as to deprive other creditors of their rights in the debtor's property.

f—A judgment obtained by fraud and collusion, under which it is sought to absorb a debtor's property to the exclusion of creditors, may be repudiated; and equity will relieve against a judgment where the defendant (complainant) was prevented from making his defense at law by the fraudulent conduct of the plaintiff (defendant). *Id.*

See EVIDENCE (18-20); MORTGAGE (3); SALE (4, 5).

FRAUDULENT CONVEYANCE.

1. It has never been decided in this State, in cases arising previous to the passage of Act No. 95, Laws of 1867, regulating the practice in cases where a levy is made upon the equitable interest of a judgment debtor, that an execution purchaser cannot attack a conveyance made in fraud of creditors, either in an action of ejectment or by bill in equity to remove a cloud upon the title. *Wolf v. O'Conner*, 124.

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FRAUDULENT CONVEYANCE—Continued.

2. The fraud covered by How. Stat. § 6203, which voids conveyances or assignments of real and personal property, or any interest therein, if made with intent to hinder, delay, or defraud creditors, is not that practiced upon the assignee or grantee of the debtor, but upon creditors; and *actual* fraud need not be intended to render the conveyance void. *Cutcheon v. Buchanan*, 594.

3. Where insolvent debtors gave a bill of sale of their personal property, and turned over a land contract upon which they had paid $50, in fraud of their creditors, but without any actual intent on the part of the assignee to defraud them, who paid the balance due on the contract, amounting to over $800, and took the deed in his own name, and after waiting several years, with full knowledge of the facts, certain creditors obtained judgments against the debtors, and levied upon said land and personal property to satisfy the same, and filed a bill in aid of said execution, the assignee will only be decreed to turn over to the complainants whatever interest the debtors have in the property, to be determined by ascertaining what he has received therefrom, and what he has in good faith expended, which can best be accomplished by an accounting in the court below. *Id.*

4. How. Stat. § 6108, authorizing the filing of bills in aid of execution, includes equitable as well as legal interests in lands, and covers a partially paid up land contract assigned in fraud of creditors; said assignor having at least an equitable interest, with the right to obtain the absolute title upon full payment. *Id.* 595.

FRAUDULENT PURCHASE—See CHATTEL MORTGAGE (4).

GARNISHMENT.

1. How. Stat. § 8086, as amended by Act No. 266, Laws of 1889, authorizing the service of a writ of garnishment upon any officer or agent of a foreign corporation found within this State, is not confined to a general agent of the corporation. *Shafer Iron Co. v. Circuit Judge*, 464.

2. How. Stat. § 8061, requiring a garnishee to appear before a circuit judge or circuit court commissioner and submit to a personal examination touching his liability as garnishee, does not apply to a foreign corporation, when summoned as garnishee. *Id.*

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GARNISHMENT—Continued.

3. A circuit judge has no power to order any or all of the officers of a foreign corporation, against which garnishment proceedings are pending, to appear and bring before him the books and papers of the corporation, and submit to an examination on oath concerning its liability as such garnishee. *Id.*

GOOD-WILL.

1. Good-will may be said to be those intangible advantages or incidents which are impersonal, so far as the grantor is concerned, and attach to the thing conveyed. *Williams v. Farrand*, 474.
2. Where good-will consists of advantages of location, it follows an assignment of the lease of that location. Again, it may not depend at all upon location, as in the case of a newspaper, and it would follow an assignment of all interest in the plant, property, effects, and business. *Id.*
3. A surname may become impersonal when it is attached to an article of manufacture, and becomes the name by which such article is known in the market, and the right to use the name may in consequence follow a grant of the right to manufacture that article, or a sale of the business of its manufacture; and when the right to manufacture is exclusive, the right to use the name as applied to the article becomes likewise exclusive. *Id.*

GUARDIAN AND WARD—See INCOMPETENT PERSON (2).

HIGHWAYS.

1. The exception from the operation of How. Stat. § 1453,—which makes it the duty of all owners of mills or other water-works, where any race or races appertaining to the same may cross a highway, to keep a good and sufficient bridge or bridges over the same,—of mills erected and races dug previous to the formation of the highway, has reference to races existing when the highway was laid out. *Commissioner of Highways v. Martin*, 115.
2. Where a dam and race were built at the same time, and the earth taken from the race was used in the construction of the dam, which was intended to be and was thereafter used as a highway in place of a portion of an old road destroyed by its construction, and the water was not let

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HIGHWAYS—Continued.

into the race until after a bridge had been built over the race, which with the dam was used instead of the old highway and bridge, such race comes within the statute cited, and the owners of the mill used in connection with said race are liable for its maintenance. *Id.*

3. The proceedings of the defendant commissioner in opening a private road through petitioner's land are quashed for the following reasons:

a—The petition for the road contains no averment that the petitioner has no other access to his lands, and the record contains no evidence that a showing of that character was made.

b—The owner of the land was a resident of the county, but absent therefrom, and no notice was served upon the occupant of the land.

c—The record contains no recital that 18 disinterested freeholders were selected, or that 6 names were struck off, or that a citation was issued by the commissioner to such freeholders, or that the jury were sworn, or that the commissioner proceeded to lay out the road.

d—No record was made and recorded in the office of the township clerk, as required by How. Stat. § 1391. *Hall v. Pettit*, 158.

4. In an action of trespass against a commissioner of highways for removing a fence which he claimed was an encroachment upon a regularly laid section-line highway, and so described it in the order for removal, the commissioner can only justify by showing that the highway is located upon the section line, and a contrary finding by the jury entitles the plaintiff to a verdict. *Cronenwaite v. Hoffman*, 617.

See EVIDENCE (8–11).

HUSBAND AND WIFE—See ASSIGNMENT OF CLAIM (2); MARRIAGE.

HYPOTHETICAL QUESTIONS—See EVIDENCE (22, 31–37, 41).

INCOMPETENT PERSON.

1. Where, in a case involving the mental competency of a grantor, plenty of witnesses are found to testify upon both sides of the controversy, and the opinions seem evenly balanced, courts will look to the circumstances surrounding the transaction, its fairness, the history and character of the

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INCOMPETENT PERSON—Continued.

grantor, and the probability that one in the possession of his faculties would make a transfer of his property in a given case. *Hemphill v. Holford*, 293.

2. Where, in such a case, the relation between the grantor and grantee is very largely in the nature of guardian and ward, and in view of the grantor's condition it becomes the grantee's duty to properly care for him and his property, it is the duty of the grantee to show entirely clean hands in the transaction. *Id.*

3. Delay by children in instituting proceedings to test the mental competency of an aged father to execute a deed until after his death is not such laches as will bar their right to file a bill to set aside the deed after his death. *Id.*

See EVIDENCE (26-34).

INDETERMINATE SENTENCES—See CRIMINAL LAW (2).

INJUNCTION—See TAXES (6).

INSANITY—See INCOMPETENT PERSON.

INSURANCE—See FIRE INSURANCE.

JUDGMENT CREDITORS' BILL—See EQUITY PLEADING (3).

JURY.

After the parties have announced themselves satisfied with the jury, and they are sworn, neither party can peremptorily challenge a juror, against the objection of the opposite party. *Ayres v. Hubbard*, 155.

See CHARGE TO JURY; CONSTITUTIONAL LAW (4); PRACTICE IN CIRCUIT COURT (3, 5, 6, 8, 10-12).

JUSTICES' COURTS—See APPEAL; ATTACHMENT (3-7); CERTIORARI.

LACHES.

The term "laches" involves the idea of negligence,—a neglect or failure to do what ought to be done under the circumstances to protect the rights of the parties to whom it is imputed, or involving injury to the opposite party through such neglect to assert rights within a reasonable time. *Ripley v. Seligman*, 180.

See INCOMPETENT PERSON (3); LAPSE OF TIME.

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LAND CONTRACT.

An executory land contract has no tendency to show any legal title in the vendee, or in any person claiming under him; and, if it conveys no legal possessory interest in or upon the land, it does not give the vendee a legal right to its possession. *Gamble v. Ross*, 315.

See FRAUDULENT CONVEYANCES (3, 4); MORTGAGE (7).

LANDLORD AND TENANT.

1. A lessee, who has not been disturbed in the enjoyment of the rights granted under his lease, cannot, in an action by the lessor to recover the rent reserved, question the right of the lessor to make the grant. *Cunning v. Boom Co.*, 237.
2. Where the grantor in a trust-deed, authorizing the trustee to lease, mortgage, or sell the premises conveyed in order to pay the debts of the grantor, is allowed by the trustee, with the assent of the creditors, to remain in possession under an arrangement to pay rent to the trustee, or to carry on the business in his own name, as it had been done, the trustee and the creditors are estopped from setting up any claim against one to whom the grantor has leased a portion of said premises. *Id.*
3. A lease of a portion of a dock, which had been leased for storage purposes to a prior lessee, who accepts and uses another portion of the dock, will not amount to an eviction of the first lessee, who will be held to have assented to the change. *Id.*
4. In a suit to recover rent, it was admitted that a fixed rental was agreed upon, payable monthly, but the parties differed as to the *term* of the lease, the lessor testifying that it was for one year, and the lessee that no definite time was agreed upon. The lessee further testified that he told the lessor that he could not tell how long he would keep the house, as he did not know himself, but, if it suited him, and nothing occurred, he would probably stay in that locality three or four years, as he wished his children to attend a school near by. And it is held that the lessee was, upon his own showing, a tenant at will, paying rent monthly, and that he could not vacate the premises without a month's notice, as provided by 3 How. Stat. § 5774. *Holmes v. Wood*, 435.
5. A defense of non-tenantability is not made out where the lessor had no notice that the house was claimed to be untenantable,

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LANDLORD AND TENANT—Continued.

and the tenant assigned other reasons for leaving the premises in his notice of removal, and, while testifying to the presence of bad odors, arising from the alleged want of repairs, did not testify that he left the house on that account. *Id.*

LAPSE OF TIME.

1. Lapse of time, though not a sufficient prohibition to constitute a statutory bar, may, if circumstances warrant, so operate by way of evidence as to create a presumption that the parties have waived or abandoned their rights; and in this connection the fact that during the delay one of the parties died should have its proper bearing. *Ripley v. Seligman*, 180.
2. Lapse of time alone is not sufficient to bar equitable relief. *Id.*

LIFE-SUPPORT—See PARENT AND CHILD (3).

LOGS AND LOGGING—See BILL FOR ACCOUNTING.

MANDAMUS.

1. An answer to a petition for *mandamus*, which denies the allegations of fact upon which the application is based, is decisive on a hearing upon petition and answer. *Grondin v. Logan*, 247.
2. A township board cannot question the election or qualification of justices of the peace, who have acted and been recognized as such for more than one year, in *mandamus* proceedings prosecuted to compel the board to allow such justices to act as members thereof. *Id.*
3. An averment in a petition for *mandamus* not expressly denied, but admitted to be true in part, in the answer, will be taken as true. *Jones v. Board of Education*, 371.

MARKET-PRICE—See SALE (1).

MARRIAGE.

Pending a suit by a wife for divorce, she remarried, and, after securing a decree, lived and cohabited with the second husband as his wife, under the belief that another marriage ceremony was not necessary, induced by his statement that he had been so advised by good counsel, and his agreement, which was kept, to make his will in her favor, and deliver

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MARRIAGE—Continued.

it to her for safe-keeping. And it is held that the formal marriage ceremony may be treated as evidence, with what subsequently occurred, of the nature of the relation which the parties assumed and occupied, and that the facts establish a valid marriage. *Williams v. Kilburn*, 279.

MEASURE OF DAMAGES—See DAMAGES.

MENTAL COMPETENCY—See INCOMPETENT PERSON.

MILL-RACE—See HIGHWAYS (1, 2).

MISTAKE—See EVIDENCE (1); STATUTES.

MORTGAGE.

1. An attorney for a mortgagee, who is charged with actively participating with his client in the fraudulent foreclosure of the mortgage, whereby all of the mortgagor's property was absorbed to the injury of creditors, is a proper, though not a necessary, party to a bill filed by a judgment creditor for an accounting and the payment of his judgment. *Sweet v. Converse*, 1.
2. Where a judgment creditors' bill alleges that the mortgagor and a receiver appointed in the foreclosure suit fraudulently conspired together to enable the mortgagee to get possession of all of the mortgagor's assets for a nominal consideration, and that the conspiracy was successful, it is not necessary to aver that as a consequence there were no assets with which to pay complainant's judgment, or that the conduct of the defendants operated as a fraud upon other creditors, or that the intent was to defraud them. *Id.*
3. Where a mortgagee of a corporation, its president, and the receiver appointed in the foreclosure suit conspire to, and do, conceal the mortgagor's property from bidders at the foreclosure sale, neither the conveyance by the receiver, nor the confirmation of the sale by the court, secured by a fraud upon it, can protect such property as against existing creditors. *Id.*
4. Where by the decree of the Supreme Court one of several mortgages is allowed to stand as a valid security for the amount which the Court find the mortgagor has been benefited, but the time for payment and the rate of interest are changed, and the mortgagee enjoined from foreclosing until

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MORTGAGE—Continued.

he has discharged the other mortgages, which are declared void, and surrendered the accompanying notes, the only method of foreclosing the lien created by the decree is by a proceeding in chancery, in which a compliance with the terms of the decree must be alleged and proved. *Strong v. Tomlinson*, 112.

5. A foreclosure by advertisement by an assignee of a mortgage, the assignment of which was executed in another state, and not so certified as to entitle it to be recorded in this State, although recorded therein, is void. *Dohm v. Haskin*, 145.
6. Equity will not permit one tenant in common, in the possession of property, for the use of which he is bound to account to his co-owner, to foreclose by separate advertisements three mortgages which he holds upon his co-tenant's interest, all of which are past due. *Id.*
7. Where the vendee in a land contract assigned it to third parties as collateral security for the performance of a contract with them, and to secure them for money advanced to pay the balance of the purchase price of the land, and in the assignment authorized the vendor to convey the land to the assignees, the papers will be construed together, and the deed treated as a mortgage. *Gamble v. Ross*, 315.
8. The mere fact that, prior to the performance of said conditions, the assignees allowed the vendee to lumber the land so conveyed to them with other lands owned by them will not be a waiver of their rights under the deed, contract, and assignment. *Id.*
9. Where in replevin by the vendee from the assignees, of lumber manufactured from logs taken from their lands and from the lands conveyed to them, the assignees claim to have made advances upon the logs cut from the latter lands, and to have received an order from the vendee turning over to them the lumber manufactured from said logs, which claims are denied by the vendee, who claims to have acted in his own right, it is for the jury to pass upon such disputed questions of fact. *Id.*
10. In case such issue is found in favor of the vendee, and it is further found that he lumbered the latter lands on his own account, being in possession of the same, all with the knowledge and consent of the assignees, the jury might be justified in finding that their lien under their mortgage was

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MORTGAGE—Continued.

waived, and that they looked personally to the vendee, and not to such security. *Id.*

See CHATTEL MORTGAGE; RECORDING LAWS (1).

MUNICIPAL CORPORATIONS.

1. Aldermen are elected by the electors of the wards, and represent the people of the wards in the legislative body of the city. *Chateau v. Jacob*, 170.
2. Where, after the presentation to a city council of a claim for taxes paid under protest, four meetings of the council are held without any action being taken regarding the claim, a suit brought at the expiration of thirty-six days from such presentation, and two days after the last council meeting, is not premature, under a charter provision barring such action if commenced before the council have had a reasonable time to investigate and pass upon the claim. *Whitney v. Port Huron*, 268.
3. Where a special assessment is set aside by a city council, and the taxes reassessed upon the same district, the land-owners cannot complain of a want of notice of the original assessment in a suit to enjoin the collection of the reassessed taxes. *Townsend v. City of Manistee*, 408.
4. Where the proportion of the cost of the construction of a sewer to be paid by a city, as determined by the council, exceeded by $180 the sum appropriated in the annual appropriation bill for that purpose, which excess was appropriated from the general sewer fund, land-owners who seek to enjoin the collection of special assessments upon their property for the construction of such sewer cannot complain because of the non-submission of the question of the appropriation of the $180 to the electors, as required by the charter, they not being injured thereby. *Id.*
5. Under a charter authorizing the city council to cause a new assessment to be made for a public improvement in place of an invalid one, a *majority* of the council have power to rescind their action in ordering the original assessment; and where the reassessment is ordered to be made by a vote of two-thirds of all of the aldermen elect, as required by the charter, the proceedings cannot be attacked because the original assessment was ordered by a greater number of the members of the council. *Id.*

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MUNICIPAL CORPORATIONS—Continued.

6. A contractor cannot recover damages of a city for being delayed in the performance of a contract for grading a street in such a manner as necessarily to cause the embankment to rest partially upon the lands of abutting owners, one of whom enjoins the performance of the contract, thereby causing the delay complained of, it appearing that both parties acted in good faith, and under the misapprehension that the city had a right so to use the abutting property as a natural and necessary incident to the improvement of the street, and without compensation to or the consent of the abutting owners; such compensation being afterwards made, and the contract performed, and the contractor paid the contract price in full. *Mathewson v. City of Grand Rapids*, 558.

7. A request by the board of public works of the city that the contractors desist from work in front of the land of other abutting owners in like manner affected pending such litigation is unimportant, as a compliance therewith would not make the city liable for the resulting damages. *Id.*

8. By an amendment to the charter of the city of Detroit, the greater portion of the territory of the village of Highland Park was attached to said city. The majority of the inhabitants of the village, including all of its officers except three trustees and the street commissioner, lived in the detached territory. After the act had taken effect *all* of the trustees met and adopted a resolution to fill the offices made vacant by the act, and ordered a special election for that purpose, which was held, and 41 of the 49 voters residing in the undetached territory voted at said election, and the officers so elected qualified and entered upon the discharge of their duties. There was nothing in the act to indicate an intention on the part of the Legislature to repeal the village charter, but, on the contrary, it expressly contemplated its continuance. And in *quo warranto* proceedings to settle the question of the continued existence of the village it is held:

a—The charter of the village was not repealed by the detaching act.

b—No repeal can be implied because so few inhabitants and so small a territory were left in the undetached portion of the village, there being no constitutional limit to the number of inhabitants or extent of territory required for the

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MUNICIPAL CORPORATIONS—Continued.

organization of a village; those questions being entirely within the discretion of the Legislature.

c—Legislating a majority of the village officers out of office did not operate to repeal the charter; nor was the corporation dissolved by the creation of vacancies in the offices of a majority of the village council, thereby destroying the power to call a special election to fill such vacancies, which power lies dormant in such case until the next regular election, or until the Legislature provides the machinery for calling an election.

d—The offices of the trustees whose residence was changed by the detaching act became vacant, and their participation in the meeting of the council thereafter held was unwarranted, and without legal effect, they being no longer *de facto* officers.

e—Without deciding whether the three remaining trustees constituted a quorum at said meeting, inasmuch as the people acted upon the validity of the notice of election given, which was understood by all of the 49 electors, all but eight of whom voted, and no one's rights having been injuriously affected, and no one defrauded of the right to vote, the election must be held valid. *People v. Highland Park*, 653.

See EVIDENCE (8–11, 40); PLEADING (2–4, 5).

NEGLIGENCE.

1. An air-gun is not so obviously and intrinsically dangerous as to charge a father with negligence in placing it in the hands of his nine-year-old son, and make him liable for injuries sustained by reason of its use by another boy, not a member of his family, to whom it is delivered by his wife, in his absence and without his knowledge or consent. *Chaddock v. Plummer*, 225.

2. The declaration in this case is held to state a cause of action, and to show substantially that at the time the plaintiff was directed to put the belt on the shaft, in doing which the accident occurred, the machinery was in motion, by reason of which, the belt being frayed, plaintiff was caught by the frayed portion of the belt while in motion, and injured; and it is further held that the contention of defendant's counsel that the declaration fails to aver what the regular way was for putting on the belt, and that if plaintiff intended to

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NEGLIGENCE—Continued.

maintain that such regular way was with the shaft in rapid motion he should so aver distinctly, precisely, and issuably, is not well taken. *Burk v. Burrell*, 289.

3. This case comes clearly within the principles laid down in *Richmond v. Railway Co.*, 87 Mich. 374, and should have been submitted to the jury. *Evans v. Railroad Co.*, 442.

4. When gates are provided by railroad companies at street crossings, the public have a right, the gates being open, to presume, in the absence of knowledge to the contrary, that the gate-men are properly discharging their duties, and are not negligent in acting upon the presumption that they are not exposed to a danger which could only arise from a disregard of such duties. *Id.*

5. Plaintiff, a street-car driver, who was injured at a railroad crossing, testified that he was signaled to "come on" by one whom he supposed to be the gate-keeper, but who was not a servant of the railroad company, and who denied giving such signal, and testified that he warned plaintiff not to attempt to make the crossing. The gate was open at the time, and the gate-keeper was temporarily absent for the purpose of attending a switch near by. And it is held that the conduct of the stranger, as found by the jury from the conflicting testimony, was proper to be considered by them as bearing upon plaintiff's contributory negligence; that an open gate would not excuse plaintiff's advance upon the crossing in the face of a signal of danger or the protests of a by-stander; and that an assurance of safety, although given by a stranger, would be entitled to consideration and weight in explanation of the conduct of one to whom such assurance was given. *Id.*

6. While negligence in providing proper means for the prevention of fires and in the management of the apparatus and fires may be inferred from the size and quantity of sparks or cinders emitted, when those things are shown, it will not in any case be presumed from the mere fact of a fire, where the testimony as to its cause is purely circumstantial. *Montgomery v. Booming Co.*, 633.

7. Negligence in the conduct of a steam-tug is the failure to use the care ordinarily used by careful men; and, it being well known that the escape of sparks cannot be absolutely prevented by the use of any appliance yet invented, the

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NEGLIGENCE—Continued.

owner cannot be held responsible upon the ground of negligence for not doing what it is practically impossible to do. *Id.*

8. Science has as yet been able to reduce the danger in the use of steam as a motive power to the minimum only; and when a party so using it has availed himself of the means generally used for the protection of property, he cannot be held liable because such means are not always effective or adequate. *Id.*

9. An allegation in a declaration in a negligence case that defendant willfully left the spark-arrester of his steam-tug open, and thereby allowed sparks to escape and be carried by the wind upon plaintiffs' docks, and set fire to them, implies that the act was done with a set purpose to accomplish the results which followed, and involves more than negligence, and implies malice. *Id.*

10. It is a matter of common knowledge that draught is essential to the operation of a steam craft; that so far it has been found practically impossible to arrest the emission of all sparks, and at the same time preserve the necessary draught; that sparks will escape, and fires will occasionally occur; and it is only when the want of ordinary care is shown in the selection, care, and operation of appliances or in the management of fires on such craft, or where the absence of proper appliances or neglect in their management or in the management of the fires can be inferred from peculiar circumstances, that the owners and operators of such craft can be made liable. *Id.*

See EVIDENCE (2, 8–11, 39, 40); PLEADING (2, 3).

NEWSPAPER REPORT OF COURT PROCEEDINGS—See PRACTICE IN CIRCUIT COURT (1).

NOTICE—See HIGHWAYS (3*b*); LANDLORD AND TENANT (4); PLEADING (5)

OFFICERS—See MANDAMUS (2).

OPINIONS—See EVIDENCE (9*c-e*, 11*c*, 15, 21, 22, 29, 34, 42).

PARENT AND CHILD.

1. In a suit by a daughter to recover from her uncle for the care and board of her mother, the court instructed the jury that

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PARENT AND CHILD—Continued.

they must find that the defendant received a valuable consideration from the plaintiff, which induced him to make the contract relied upon, as a naked promise was void on general principles of law. The court also instructed the jury that if they should find that the defendant was desirous of aiding in the support of his sister, and agreed with the plaintiff to pay her the charges and expenses of such support above the pension she was receiving, the plaintiff could recover what such support was reasonably worth. Error is assigned upon the first portion of the charge. And it is held that the second instruction, taken in connection with the first, sufficiently explained what would be a consideration for the promise of the defendant. *Howe v. Hyde*, 91.

2. It was not error for the court to instruct the jury that the plaintiff was legally bound to maintain and care for her mother at her own expense, under the statutes of the State, if able to do so, and that the defendant was not liable to pay for his sister's support and maintenance. *Id.*

3. An aged father conveyed a life-estate in his farm to his son, in consideration of $1 and the payment by the son to his sister of $100. The son gave his father a life-lease, coupled with an agreement to furnish him a life-support. The father then conveyed the fee of the land to his grandson, subject to his son's life-estate. After living with his son for a few months under this arrangement, the father left, by reason, as he claims, of cruel treatment and non-support, and conveyed the land to other parties, in consideration of their agreement to support him during his natural life, and soon afterwards joined with them in a bill to set aside the former deeds, but died before the hearing of the cause. And it is held that the father was justified in leaving his son's house, and in declaring the contract for support forfeited; and a decree is ordered to be entered in favor of the second grantees for the amount expended by them in the support of the father, which sum is to be a first lien upon the land, and may be paid by the son or daughter or grandson within 90 days, and, in default, the second grantees may sell the land upon like notice as in foreclosure cases. *Boyden v. McRoberts*, 184.

4. Delay by children in instituting proceedings to test the mental competency of an aged father to execute a deed until

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PARENT AND CHILD—Continued.

after his death is not such laches as will bar their right to file a bill to set aside the deed after his death. *Hemphill v. Holford*, 293.

See DEED (2).

PARTIES.

1. An attorney for a mortgagee, who is charged with actively participating with his client in the fraudulent foreclosure of the mortgage, whereby all of the mortgagor's property was absorbed to the injury of creditors, is a proper, though not a necessary, party to a bill filed by a judgment creditor for an accounting and the payment of his judgment. *Sweet v. Converse*, 1.
2. A married woman brought suit in her own name for the support of her mother. Her husband testified that the promise of the defendant to pay for such support was made to him personally, and afterwards testified that it was made to himself and wife jointly, in which latter statement he was corroborated by his wife. The husband further testified that he was willing that his wife should bring the suit in her own name. The court instructed the jury that, if they should find that the promise was made to plaintiff and her husband jointly, she could not recover in her own name; which instruction is sustained, the statement of the husband as to his wife bringing the suit in her own name not being an assignment, nor an equivalent to an assignment, of his interest in the claim sued for. *Howe v. Hyde*, 91.

PARTNERSHIP.

1. The following propositions must be regarded as established by the clear weight of authority:

   a—Though a retiring partner may have assigned his interest in the partnership business, including its good-will, to his co-partner, he may, in the absence of an express agreement to the contrary, engage in the same line of business in the same locality, and in his own name.

   b—He may, by newspaper advertisements, cards, and general circulars, invite the general public to trade with him, and through the same mediums may advertise his long connection with the old business, and his retirement therefrom.

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PARTNERSHIP—Continued.

c—He will not be allowed, however, to use his own name, or to advertise his business, in such a way as to lead the public to suppose that he is continuing the old business; hence he will not be allowed to advertise himself as its successor.

d—The purchaser will not, in the absence of an express agreement, be allowed to continue the business in the name of the old firm.

e—No man has a right to sell or advertise his own business or goods as those of another, and so mislead the public, and injure the business of such other person.

f—When an express contract has been made to remain out of business, or for the use by the purchaser of a fictitious name, or a trade-name, or a trade-mark, the courts will enjoin its continued violation.

g—An assignment of all the stock, property, and effects of a business, or the exclusive right to manufacture a given article, carries with it the exclusive right to use a fictitious name in which such business has been carried on, and such trade-marks and trade-names as have been in use in such business. These incidents attach to the business or right of manufacture, and pass with it.

h—A corporate name is regarded as in the nature of a trade-mark, even though composed of individual names, and its simulation may be restrained. *Williams v. Farrand*, 478.

2. A partnership name may become impersonal after the death of the partners, and it is then treated like a fictitious or corporate name. *Id.* 474.

3. The doctrine that a retiring partner, who has conveyed his interest in an established business, whether the good-will be included or not, cannot personally solicit the customers of the old firm, has no support in principle. *Id.*

4. The rule that upon the dissolution of a firm neither partner has the right to use the old firm name, as well as the other rule that a retiring partner has no right to use it, are subject to the exception that a person has the right to use his own name unless he has expressly covenanted otherwise. *Id.*

5. Complainants have, under the authorities cited, an undoubted right to protection in the proprietary rights acquired by the old firm, and in the use of such trade-marks as were in use by the old firm, and defendants have no right so to imitate the labels in use by the old firm as to convey the belief that

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PARTNERSHIP—Continued.

the goods labeled are from the old house. The use, however, of the words, "Sold by Farrand, Williams & Co.," or "Prepared by Farrand, Williams & Co.," upon a label, will not be protected as a trade-mark or trade-name, and the right to use the name in that connection did not pass under the bill of sale set forth in the opinion. *Id.*

6. A general agreement by one partner on the dissolution of the firm to assume and pay all of the firm debts, without further specification, is not admissible in evidence on the part of the plaintiff in a suit subsequently brought against the firm to recover for money borrowed by the other partner for the use, as claimed, of the firm, which is denied by the partner making said agreement, who, as conclusively shown by the evidence, never recognized plaintiff's claim as a firm debt. *Coller v. Porter*, 549.

7. In a suit against a firm to recover for money loaned to one of the partners, the other partner defended on the theory that the loan was for the individual use of the partner making it, with the knowledge of the plaintiff, while the plaintiff contended, and the testimony on her behalf tended to show, that it was necessary to use the money in the firm business, and that it was borrowed for that purpose. And it is held that the plaintiff was properly asked on her direct examination if she knew of any attempt on the part of the partner who made the loan to defraud his copartner, and, if he had taken advantage of him in any way, whether she had been a party to such action in any way, or had knowledge of it. *Id.*

8. It appeared on the trial that the partner who made the loan was using the firm money for his individual use without charging it on the books; that he was also a borrower; that although the manager of the business, he kept the firm books in such a condition as to prevent his copartner from knowing what he was doing; and that, if not actually engaged in defrauding him, he was grossly negligent, and acted in bad faith towards him in the conduct of the business. And it is held that said copartner was entitled to a searching cross-examination of his copartner when sworn in behalf of the plaintiff, and to inquire fully into his financial condition and transactions from the commencement of the business, and his intentions towards him, and to inquire if

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PARTNERSHIP—Continued.

he did not know at the time he went into said business that he had no money with which to enter the same. *Id.* 550.

9. In the absence of an agreement to the contrary, either member of a firm engaged in the wholesale and retail grocery business has the right to borrow money for the purposes of the business. *Id.*

10. Third parties have a right to rely upon such implied authority, and if they loan money in good faith to one partner, without knowledge or notice of such facts as would lead an ordinarily prudent person to suspect that the loan is made for the individual use of the partner making it, they can recover against the firm. *Id.*

See CHATTEL MORTGAGE (2).

PATENT—See EVIDENCE (18).

PEREMPTORY CHALLENGE—See JURY.

PLEADING.

1. The declaration in this case is held to state a cause of action, and to show substantially that at the time the plaintiff was directed to put the belt on the shaft, in doing which the accident occurred, the machinery was in motion, by reason of which, the belt being frayed, plaintiff was caught by the frayed portion of the belt while in motion, and injured; and it is further held that the contention of defendant's counsel that the declaration fails to aver what the regular way was for putting on the belt, and that if plaintiff intended to maintain that such regular way was with the shaft in rapid motion he should so aver distinctly, precisely, and issuably, is not well taken. *Burk v. Burrell*, 289.

2. In a negligence case brought under Act No. 264, Laws of 1887 (3 How. Stat. §§ 1446*c*—1446*h*), against a municipal corporation for failing to keep a highway in repair, the declaration must aver:

a—That the highway within which the accident happened was open to public travel.

b—That it had been in use as a public highway for 10 years.

c—But it need not refer expressly to the statute. *Clark v. Village of North Muskegon*, 308.

3. An objection that a declaration in a negligence case fails to

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PLEADING—Continued.

refer to the statute, by virtue of which alone the right of action exists, cannot be raised upon the trial under the plea of the general issue. *Id.*

4. A declaration which describes the defendant as "the village of North Muskegon, a municipal corporation of the State of Michigan," sufficiently alleges its corporate existence. *Id.*
5. Notice must be given of a defense of non-tenantability in a suit to recover rent for the use of a dwelling-house. *Holmes v. Wood*, 435.
6. Where, in a suit by contractors against a city to recover damages for being delayed in the performance of the contract, the declaration sets forth the contract in full, but not the specifications, which are referred to in the contract, and made a part thereof, it is proper pleading for the defendant to attach to its demurrer a copy of the specifications, and thus exhibit the entire contract to the court. *Mathewson v. City of Grand Rapids*, 558.
7. Where in a flowage case the cause of action set forth in the declaration is the maintenance of a dam and the consequent obstruction of the flow of the waters of a stream, which are thereby set back and made to overflow plaintiff's land, an amendment alleging that the water upon plaintiff's land, which is low and wet, is held back and kept on the land by reason of the maintenance of said dam, to the injury of the land, does not introduce a new cause of action, but alleges an additional injury from the same cause, and is properly allowed, after the close of the testimony, to cover the proofs in the case. *Shearer v. Middleton*, 621.
8. An allegation in a declaration in a negligence case that defendant willfully left the spark-arrester of his steam-tug open, and thereby allowed sparks to escape and be carried by the wind upon plaintiffs' docks, and set fire to them, implies that the act was done with a set purpose to accomplish the results which followed, and involves more than negligence, and implies malice. *Montgomery v. Booming Co.*, 633.

PRACTICE IN CIRCUIT COURT.

1. During the second trial of a negligence case, the newspapers of the city where the trial was being had published an item stating the amount of the verdict recovered by the plaintiff on the first trial, which was read by members of the jury; whereupon the defendant's counsel requested the

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PRACTICE IN CIRCUIT COURT—Continued.

court to arrest the progress of the trial and grant a new trial. The application was denied, and error is assigned upon the ruling as prejudicial, and especially so in view of the fact that the second verdict was larger than the first. And it is held that this rule, if established, would render incompetent every juror who knew the amount of the former verdict; that intelligent men, who are the most competent jurors, are usually readers of newspapers, which have the right to publish the verdicts and judgments rendered in the courts; and that the reading of such reports will not render jurors incompetent. *Sherwood v. Railway Co.*, 108.

2. No affidavit of non-appearance is necessary before entering a defendant's default for failure to plead, of which fact the court will take judicial notice. *Edson v. LaLonde*, 162.

3. The remark of one of the plaintiffs in his argument to the jury, that he "could point to some other cases where the defendant had captured men's logs and never paid for them," was improper, and should have been rebuked by the court; but the Court are not prepared to hold that it is reversible error. *DeLong v. Booming Co.*, 282.

4. A defendant who has not rested his case cannot except to the refusal of the court to direct a verdict in his favor. *Kelso v. Woodruff*, 299.

5. The question whether plaintiff was the procuring cause of the sale on account of which he seeks to recover a commission of $100, which he claims the defendant agreed to pay him if he found a purchaser, is held to have been, under the evidence, a question of fact for the jury. *Id.*

6. In opening a case to the jury, counsel should not enter into a detailed statement of the testimony by which he expects to substantiate the facts of his case, but only call attention to the salient points, without repeating the evidence by which he expects to prove them; the object being to assist the jury to understand the testimony as introduced, and its bearing upon the issues involved. *Zucker v. Karpeles*, 413.

7. There is no rule of practice prohibiting an attorney from requesting a witness to repeat on cross-examination his direct testimony upon a particular point; nor is it a sufficient reason for refusing to permit cross-examination respecting

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PRACTICE IN CIRCUIT COURT—Continued.

what has been testified to that the witness has already testified upon that subject. *Id.*

8. How. Stat. § 7606, as amended by Act No. 15, Laws of 1885, providing for the submission of special questions to the jury, is construed as follows:

a—It is error to refuse to submit such questions if proper in form and substance.

b—There can be no objection to the submission of the questions by the court to the opposite counsel for inspection, who has the right to frame questions, and to have the jury instructed to answer them if they find a general verdict against his client.

c—Counsel are not obliged to furnish special questions until after the arguments are closed, but if they do so there is no reason why the questions should not be discussed to the jury if they relate to the merits of the controversy. *Id.* 414.

9. Witnesses are entitled to respectful consideration, and it is the duty of courts to see that they are protected from the insinuations and attacks of counsel, whether direct or in the form of a suggestive question. *People v. Cahoon*, 456.

10. Counsel, in their opening to the jury, should be limited to a brief and concise statement of the facts which they propose to prove, of which it is their duty to inform themselves, and to satisfy themselves of their *right* to prove them; and such opening is not the place for argument. *Prentis v. Bates*, 567.

11. A will was contested on the grounds of undue influence and mental incompetency. After the case had been argued to the jury for six days, the court withdrew the former question from their consideration. On appeal by the proponents, they objected to the action of the court, on the ground that the ruling should have been made at the close of contestants' testimony, it being fair to presume that the jury were prejudiced by the arguments of contestants' counsel upon the question of undue influence. And it is held that it is important to eliminate such questions from the consideration of the jury as soon as possible, and that it is the better practice to have them discussed in the absence of the jury, if claimed to be questions of law and not of fact;

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PRACTICE IN CIRCUIT COURT—Continued.

but that it is quite possible, even where the question is first argued before the court alone, that the judge may not become convinced of his duty in the matter until after the arguments to the jury, and in such a case it will not be presumed that they did not follow the instructions of the court, and leave the question out of their consideration. *Id.* 568.

12. Where plaintiff's testimony makes a *prima facie* case, and is contradicted in material parts by that of the defendant, the case should be submitted to the jury. *McDonald v. Ortman*, 645.

PRACTICE IN SUPREME COURT.

1. There is no practice allowing writs of *certiorari* to issue from the Supreme Court to justices of the peace. *White v. Boyce*, 349.
2. The allowance of a writ of *certiorari* from the Supreme Court to a justice of the peace is exceptional, and only favored when necessary to prevent a failure of justice. *Id.*

PRESUMPTION—See LAPSE OF TIME (1).

PRINCIPAL AND AGENT.

1. Where, pending negotiations by wire and mail for the purchase of cedar posts, the vendor wrote to the vendee that if certain posts were not sold he could have them at a stated price, and that he would know by a certain date if the posts were sold, such letter amounted in law to a withdrawal of said posts from sale until the date named, and was a sufficient notice to the vendee that he must deal with the vendor personally; and a sale by an agent in charge of the posts, made after such date, is held not binding upon the principal. *Keith v. Lumber Co.*, 172.
2. The questions involved in this case are the authority of the defendant's book-keeper to employ plaintiffs to defend garnishment proceedings prosecuted against the defendant, and its knowledge that plaintiffs were conducting such suit in its behalf; upon both of which it is held there was testimony warranting the charge of the court, and sufficient to go to the jury. *DeLong v. Booming Co.*, 282.
3. Agency cannot be established by testimony as to the statements of the alleged agent relating to the *fact*, or to the

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PRINCIPAL AND AGENT—Continued.
possession of any of the *indicia*, of agency. *Henneberger v. Matter*, 396.

PRINCIPAL AND SURETY—See REPLEVIN.

PRIVATE ROAD—See HIGHWAYS (3).

PROSECUTING ATTORNEY—See CRIMINAL LAW (5-8).

PROTEST—See TAXES (2-4).

PUBLIC POLICY—See SALE (1).

QUANTUM MERUIT—See CONTRACT (8, 9).

QUESTIONS TO JURY—See PRACTICE IN CIRCUIT COURT (8).

QUITCLAIM DEED—See BONA FIDE PURCHASER (1).

RACE—See HIGHWAYS (1, 2).

RAILROAD COMPANIES.

1. A rule by which a railroad company reserves the right to assign places upon its own grounds to the different hackmen, and to exclude from such places others not assigned thereto, is reasonable, and a rule which the company has a right to enforce. *Cole v. Rowen*, 219.
2. A depot master, who, acting under the direction of the railroad company, in attempting to enforce such rule, uses no more force than is necessary to eject a hackman from a place to which he has not been assigned, and which he is unlawfully attempting to occupy and hold, is not guilty of an assault and battery. *Id.*
3. The following rules adopted by a railroad company for enforcement upon its own grounds are held reasonable:
"*a*—Location for omnibuses and hacks will be assigned to parties, who will occupy them while standing at the depot to get passengers.
"*b*—Drivers must take the stands which are assigned them, and will not be allowed to take places assigned to others.
"*c*—The positions assigned must not be occupied more than 20 minutes previous to the arriving time of passenger trains.
"*d*—Each driver must remain by his hack or omnibus when soliciting passengers.
"*e*—No hacks or omnibuses will be allowed to stand in

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RAILROAD COMPANIES—Continued.

the porch longer than necessary to load or unload passengers.

"*f*—The drivers of hacks and omnibuses will not be allowed in waiting rooms, except on business.

"*g*—Profane, obscene, boisterous language, or quarreling, will not be allowed on the depot grounds.

"*h*—Only one transfer wagon will be allowed to stand at the baggage-room, which will be the baggage-wagon that is hired by the railroad companies to transfer baggage between the different depots." *Id.*

4. When gates are provided by railroad companies at street crossings, the public have a right, the gates being open, to presume, in the absence of knowledge to the contrary, that the gate-men are properly discharging their duties, and are not negligent in acting upon the presumption that they are not exposed to a danger which could only arise from a disregard of such duties. *Evans v. Railroad Co.*, 442.

5. Plaintiff, a street-car driver, who was injured at a railroad crossing, testified that he was signaled to "come on" by one whom he supposed to be the gate-keeper, but who was not a servant of the railroad company, and who denied giving such signal, and testified that he warned plaintiff not to attempt to make the crossing. The gate was open at the time, and the gate-keeper was temporarily absent for the purpose of attending a switch near by. And it is held that the conduct of the stranger, as found by the jury from the conflicting testimony, was proper to be considered by them as bearing upon plaintiff's contributory negligence; that an open gate would not excuse plaintiff's advance upon the crossing in the face of a signal of danger or the protests of a by-stander; and that an assurance of safety, although given by a stranger, would be entitled to consideration and weight in explanation of the conduct of one to whom such assurance was given. *Id.*

See TAXES (5).

RECORDING LAWS.

1. An assignment of mortgage executed in Kansas, and acknowledged before a notary public, is not entitled to record in Michigan unless the official character of the notary and the genuineness of his signature, and the fact that the assignment is executed and acknowledged according to the laws

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of Kansas, are certified to by the clerk or other proper certifying officer of a court of record, as required by How. Stat. § 5660. *Dohm v. Haskin*, 144.

2. How. Stat. § 5659, provides that a deed executed in any other state, territory, or district of the United States may be executed according to its laws, and that such execution may be acknowledged before any judge of a court of record, notary public, justice of the peace, master in chancery, or other officer authorized by the laws of such state, territory, or district to take the acknowledgment of deeds therein, or before any commissioner appointed by the Governor of this State for such purpose. *Id.*

3. How. Stat § 5660, prior to the amendment of 1891, provided that in cases specified in section 5659, unless the deed was acknowledged before a commissioner of deeds for Michigan, it should be authenticated by the certificate of the clerk or other proper certifying officer of a court of record of the county or district, or of the secretary of state of the state or territory, within which the acknowledgment was taken, under the seal of his office, showing that the acknowledging officer was at the date of the certificate of acknowledgment such officer as he was therein represented to be, and that the certifying officer believed the signature of such acknowledging officer to be genuine, and that the deed was executed and acknowledged according to the laws of such state, territory, or district. This section was amended by Act No. 112, Laws of 1891, which provides that deeds acknowledged before a judge of a court of record under the seal of said court, or before a notary public who certifies to such acknowledgment under his official seal, may be recorded without having attached thereto the certificate hereinbefore mentioned. The amendment further provides that "whenever any deed, or other instrument affecting the title to land, executed, acknowledged, and authenticated in accordance with this section and the last preceding section, has been heretofore recorded in the proper county, such record, or a certified transcript thereof, shall be *prima facie* evidence of the due execution of such instrument, to the same extent as if it had been authenticated as required by the statute in force at the time such instrument was recorded." *Id.*

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RECORDING LAWS—Continued.

4. A foreclosure by advertisement by an assignee of a mortgage, the assignment of which was executed in another state, and not so certified as to entitle it to be recorded in this State, although recorded therein, is void. *Id.* 145.

See BONA FIDE PURCHASER (1).

REMEDY AT LAW—See BILL FOR ACCOUNTING.

REPEAL OF STATUTE—See MUNICIPAL CORPORATIONS (8).

REPLEVIN.

1. A surety in a replevin bond, who acts as agent for the plaintiff in the issuance of the writ by the justice, and in the seizure of the property, which was delivered to the plaintiff, cannot escape liability in a suit on the bond for a failure to return the property pursuant to a judgment for such return by showing that no affidavit was filed with the justice before the writ was issued. *Stimer v. Allen*, 140.
2. The amendment of a writ of replevin, after the execution of the statutory bond, by which other property is inserted in the writ without the knowledge or consent of the sureties, by stipulation of the respective parties, discharges the sureties from liability, unless it is made to appear in the suit upon the bond that the amendment, which is followed in the declaration, made no change in their liability. *Bolton v. Nitz*, 354.

See MORTGAGE (9, 10).

SALE.

1. Plaintiffs were manufacturers of machine knives, and shipped to the defendant upon his written order, but without any agreement as to price, two sets of hoop knives, charging him therefor the price fixed by an association embracing in its membership all of the knife-makers in the United States. One of the principal objects of the association was to *keep up prices*, and each member was obliged, under a penalty of $100, to sell only at the prices so fixed, which were subject to change without notice. The defendant had purchased knives of another manufacturer during the two previous years at a lower price, which had been advanced by the association without notice to customers, and which advanced price was charged for the knives ordered by the

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SALE—Continued.

defendant. The case was submitted to the jury upon the theory that a combination to fix prices was not unlawful if its purpose was to fix *reasonable* prices, and when the defendant sought to show that the price fixed in this case was not a fair market price, but above the market value, the court refused to permit such showing, and restricted the defendant to the *market price*. The plaintiffs recovered a judgment, in the reversal of which all of the Justices concur.

Mr. Justice MCGRATH filed an opinion, in which MORSE, J., concurred, holding:

a—In *Richardson v. Buhl*, 77 Mich. 632, it was held that any combination to control prices was unlawful, as against public policy.

b—Independently of the unlawful character of a combination of manufacturers to fix prices, such a price is no better evidence of value than one fixed by any vendor upon his wares, and is not a *market price*, within the contemplation of the law.

c—The market price of an article manufactured by a number of different persons is a price fixed by buyer and seller in an open market, in the usual and ordinary course of lawful trade and competition.

d—In the absence of an agreement, a price fixed by a combination of dealers does not bind the purchaser, nor will the law so far countenance such combinations as to regard prices fixed by them as even evidence of value.

Chief Justice CHAMPLIN filed an opinion, holding:

a—In executed contracts of sale upon credit, where the price is not agreed upon at the time of the sale, the law implies an understanding to pay what the commodity is reasonably worth.

b—A price *arbitrarily* fixed by a combination of manufacturers or dealers is not competent evidence to show a *reasonable price* for goods sold by members of the combination.

c—Such combinations are intended to stifle competition, which is a stimulus of commercial transactions, and to substitute that of unconscionable gain, whereby the participants become enriched at the expense of the consumer, beyond what he ought legitimately to pay under a healthy spirit of competition in the business community.

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SALE—Continued.

d—The effect of such combinations is the same as that of contracts in restraint of trade, and public policy places its reprobation alike upon both.

e—Combinations to control prices are against public policy, and void, because they have a mischievous tendency, and are injurious to the best interests of the State, which require that all legitimate business shall be open to competition; that the current prices of commodities shall be controlled by the law of supply and demand; that the laws of commerce shall flow in their accustomed channels, and not be diverted by combinations to control prices fixed by the arbitrary decision of interested parties.

f—In executory contracts of sale, where the goods have not been accepted, prices so fixed cannot be recovered; nor are they a criterion of the market value or current price in an action brought for goods sold and delivered without an agreement as to price.

g—If there is no market value of manufactured goods, the evidence to establish their reasonable worth must necessarily be the cost of production, which includes the cost of labor and material, and a reasonable profit thereon.

Mr. Justice GRANT filed an opinion, concurred in by LONG, J., holding:

a—Associations of manufacturers are not necessarily unlawful, but may be entirely lawful, while an arbitrary price fixed by them will not bind a purchaser who has not expressly agreed to pay it.

b—The price of commodities bought and sold may be fixed by express agreement, by the market, or by the actual value; and this rule applies to daily commercial transactions between buyer and seller, where one orders, and the other completes the transaction by delivering the goods. If there is no express agreement and no market price, the contract is to pay what the commodity is reasonably worth.

c—A market price is one fixed by fair and open competition in an open market, where seller and buyer stand upon an equal footing.

d—If there be a "fair market price," distinguishable in law from the "market price," then there is no such thing as a "market price," binding upon sellers and buyers, unless they contract with express reference to it, but it must be

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SALE—Continued.
left to a jury in each case to determine what is a fair market value. But a price fixed by a combination of sellers or of buyers is not a market price, and binds no one. *Lovejoy v. Michels*, 15–17.

2. Where, pending negotiations by wire and mail for the purchase of cedar posts, the vendor wrote to the vendee that if certain posts were not sold he could have them at a stated price, and that he would know by a certain date if the posts were sold, such letter amounted in law to a withdrawal of said posts from sale until the date named, and was a sufficient notice to the vendee that he must deal with the vendor personally; and a sale by an agent in charge of the posts, made after such date, is held not binding upon the principal. *Keith v. Lumber Co.*, 172.

3. The conduct of plaintiff's agent in insisting that the harvesting machine purchased by the defendant should be kept over harvest for further trials, which resulted in the failure of the machine, is held to constitute a waiver of a provision in the warranty accompanying the machine that keeping it during harvest, whether kept in use or not, without giving notice to plaintiff of the defects complained of as provided in the warranty, should be conclusive evidence that the machine filled the warranty. *Snody v. Shier*, 304.

4. The failure of a vendee who knows that he is insolvent to disclose that fact to the vendor will not make the purchase fraudulent, unless coupled with an intent at the time of the purchase not to pay for the goods. *Zucker v. Karpeles*, 414.

5. Representations made by a merchant to a commercial agency as to the amount of his indebtedness, but not as to his assets, and not shown by any competent testimony to have been communicated to or relied on by vendors from whom he orders goods five months afterwards, have no tendency to prove an intention on his part not to pay for the goods at the time he gave the order. *Id.*

See CHATTEL MORTGAGE (3, 4); CONTRACT (2); DIRECTING VERDICT (2); EVIDENCE (44).

SCHOOLS AND SCHOOL-DISTRICTS.

1. The purchaser of a school-district bond need look no further back than its face for the facts which show a compliance with the statute under which it is issued. *Gibbs v. School-district No. 10*, 334.

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SCHOOLS AND SCHOOL-DISTRICTS—Continued.

2. The failure of the director of a school-district to keep a record of the order of the district board directing him and the moderator to issue a school-district bond will not affect the title of a *bona fide* holder of the bond, where the fact of the making of said order is recited upon the face of the bond. *Id.*
3. Where the statute makes the district board, who are empowered to issue the bond, the body to determine when the statutory facts authorizing its issuance exist, which facts appear upon the face of the bond issued by their direction, the district cannot defend as against a *bona fide* holder upon the ground that the law was not complied with previous to the determination of the district board to issue the bond. *Id.*
4. Act No. 165, Laws of 1887 (8 How. Stat. § 5067), prohibiting a change of text-books adopted by a school board under its provisions within five years, except by the consent of a majority of the qualified voters of the district present at an annual meeting, or a special meeting called for that purpose, applies to city schools organized under a special charter which does not provide for such annual meeting. *Jones v. Board of Education*, 371.
5. A *mandamus* is granted in this case to compel the board of education of the city of Detroit to rescind a resolution reconsidering one passed at a former meeting adopting a text-book for use in place of one which had been in use for upwards of five years, and making a different selection; it appearing that in the interim the publishers of the book first adopted, and the patrons of the school, had acted in reliance upon the rescinded resolution in the sale and purchase of books. *Id.*
6. The *power* to adopt text-books is conferred by law, and cannot be affected by any rule of the board fixing a time for the reconsideration of motions and resolutions. *Id.*
7. The district board of a primary school-district has power to contract with a qualified teacher for such term during the ensuing year as shall be determined by the qualified voters of the district at the annual school meeting thereafter to be held. *Cleveland v. Amy*, 374.
8. The term "all other school officers," as used in Act No. 18,

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SCHOOLS AND SCHOOL-DISTRICTS—Continued.

Laws of 1885 (3 How. Stat. § 5132), which provides "that in the election of trustees, and *all other school officers*, the person receiving a *majority* of all the votes shall be declared elected," includes the director, moderator, and assessor of primary school-districts. *Id.* 375.

9. The power to employ teachers conferred by How. Stat. § 5065, upon the district boards of primary schools, is co-extensive with that conferred by How. Stat. § 5134, upon the boards of trustees of graded schools. *Id.*

See STATUTES.

SERVICE—See APPEAL; ATTACHMENT (3–7); GARNISHMENT.

SPECIAL APPEAL FROM JUSTICE'S COURT—See APPEAL.

SPECIAL QUESTIONS TO JURY—See PRACTICE IN CIRCUIT COURT (8).

SPECIFIC PERFORMANCE—See CONTRACT (4).

STATUTE OF FRAUDS.

After plaintiff had entered upon the performance of a contract made with a contractor of defendant to do some dredging, one of the defendant's officers said to him that the defendant would keep enough of the contractor's money back to pay plaintiff for the work he would do dredging, and another officer remarked that it was pretty early to do that, to which the first officer responded, "We have to do the work; we cannot let it be delayed,"—which promise or guaranty is held to come within the statute of frauds. *Dupuis v. Improvement Co.*, 103.

STATUTE OF LIMITATIONS—See LAPSE OF TIME.

STATUTES.

Act No. 382, Local Acts of 1891, which detaches certain territory from graded school-district No. 1 of the township of Cottrellville, in the county of St. Clair, and attaches it to school-district No. 7 of the same township, is not void because of a mistake in the description of the land detached, namely, designating a section as fractional when not so, and a private claim as No. 198, when it should be "598," there

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STATUTES—Continued.
being no private claim other than No. 598 in the district. *Baird v. Shea*, 385.
See MUNICIPAL CORPORATIONS (8).

STATUTES CONSTRUED.

1. Act No. 6, Laws of 1889, does not authorize associations organized under it to proceed to the transaction of business until the entire capital stock is subscribed; neither does it authorize or provide for any preliminary subscription for stock, nor for any subsequent subscription to the capital stock. *International Fair, etc., Ass'n v. Walker*, 63.
2. Under the statutes of this State (How. Stat. § 1741), a daughter is legally bound to maintain and care for her indigent mother at her own expense, if able to do so, and a brother of the mother is not so liable. *Howe v. Hyde*, 91.
3. The exception from the operation of How. Stat. § 1453,—which makes it the duty of all owners of mills or other water-works, where any race or races appertaining to the same may cross a highway, to keep a good and sufficient bridge or bridges over the same,—of mills erected and races dug previous to the formation of the highway, has reference to races existing when the highway was laid out. *Commissioner of Highways v. Martin*, 115.
4. Certain provisions of Act No. 190, Laws of 1891, entitled "An act to prescribe the manner of conducting and to prevent fraud and deception at elections in this State," and made applicable to municipalities by Act No. 194, Laws of 1891, are construed as follows:

a—Where the vignette adopted by a political party, and forwarded to the election commissioners with the names of the candidates nominated, combines within it the name of the party or political organization which the committee forwarding it represent, it is unnecessary to put another heading below it.

b—When the call for a convention of a political party results in the holding of two nominating conventions, it is not the province of the board of election commissioners to determine which convention represented the *regular* nominating convention of the party, but it is their duty to place upon the ballot the names of the candidates certified to them by the committee of either branch of the party represented by the two conventions; and if the name of a party shall

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STATUTES CONSTRUED—Continued.

be certified by each of the two committees, it is the duty of the commissioners to print the names so certified without further addition or distinctive designation than such as is contained in the certificates so furnished. *Shields v. Jacob*, 164.

5. It is not the duty of the board of election commissioners provided for by Act No. 194, Laws of 1891, to print upon the ballot the name of a candidate for alderman not selected by any assemblage or meeting of electors of his ward. *Chateau v. Jacob*, 170.

6. How. Stat. § 7545, prohibiting the opposite party, in a suit "prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person," from testifying to facts which, if true, must have been equally within the knowledge of the deceased, is construed as follows:

a—The word "assigns" is used in its legal sense, and signifies a person to whom any property or right is transferred by a deceased person in his life-time.

b—The statute is broad enough to cover *successive* transfers, or where the controversy depends upon the acts or dealings with the property of the deceased in his life-time; and any one who is called upon to prosecute or defend some interest which is affected by the act or agreement of the deceased party through whom he claims may invoke the protection of the statute.

c—The case of *Twiss v. George*, 33 Mich. 253, in which it was held that the statutory prohibition did not extend to controversies with third persons acting in their own right as purchasers during the life-time of the deceased, and not taking by *post mortem* estate, arose under the statute as it read before the 1875 amendment, and cannot be taken as an exposition of the present law.

d—While the representatives of a deceased person cannot waive the provision of the statute (*McHugh v. Dowd Estate*, 86 Mich. 412), the decedent's assigns may do so.

e—In applying the statute, care should be observed in distinguishing between matters equally within the *knowledge* of the deceased and matters within his *information*, as it is only as to the first that the opposite party is not permitted to testify.

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STATUTES CONSTRUED—Continued.

f—The statute was not intended to exclude testimony concerning facts capable of proof by documentary evidence accessible to both parties, as, for instance, the dates or contents of written instruments of a public character, where such testimony is not excluded under other rules governing the admission of testimony. *Ripley v. Seligman*, 177.

7. A grantee in a quitclaim deed may invoke the aid of How. Stat. § 5572, which declares that "no implied or resulting trust shall be alleged or established to defeat or prejudice the title of a purchaser for a valuable consideration, and without notice of such trust;" and he has the burden of showing the facts necessary to bring him within the statute. *Id.* 179.

8. Act No. 73, Laws of 1891, amending How. Stat. § 7005, by authorizing service upon the agent or attorney who appears for a party who obtains a judgment in justice's court, from which a special appeal is sought to be taken, of notice of all subsequent proceedings in the cause, is not retroactive. *Danville Stove, etc., Co. v. Circuit Judge*, 244.

9. Sections 4 and 7 of chapter 2 of the drain law of 1885 (3 How. Stat. §§ 1740*a*7, 1740*b*) are construed:

a—As giving to the county drain commissioner concurrent jurisdiction with the township drain commissioner of drains *entirely* within the latter's township.

b—As prohibiting the spreading of taxes for the construction of drains by such commissioner until all of the records thereof required to be made by him are filed with the county clerk. *Conley v. Supervisors of St. Clair Co.*, 245.

10. How. Stat. § 745, which provides that when, from any cause, there shall not be three of the officers constituting the township board of a township competent or able to act, one of the remaining justices, on being notified by any member of the board, shall meet with any members of the board, and possess like authority with them, authorizes the members to call upon any justice of the peace of the township to act *temporarily* as a member of the township board. *Grondin v. Logan*, 247.

11. *Actual knowledge* and intent to defraud must be shown in order to warrant the conviction of a respondent under Act No. 9, Laws of 1887 (3 How. Stat. § 9209*d*), which makes it a criminal offense to give knowingly a false pedigree of any animal, with intent to defraud. *People v. Umlauf*, 274.

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STATUTES CONSTRUED—Continued.

12. Act No. 149, Laws of 1889 (3 How. Stat. § 8016*a*), authorizing the issuance of a writ of attachment before the maturity of the debt, is construed as follows:

a—The plaintiff must show reasons for the immediate issuance of the writ, which showing must consist of *facts* within the knowledge of the affiant, and not of mere *conclusions* of fact.

b—The reason for the issuance of the writ must be shown by facts and circumstances so given in detail as to enable the circuit judge to satisfy himself from such facts and circumstances that the writ ought to issue.

c—It will not do for the affiant simply to swear that he *knows* that the defendant has assigned, disposed of, or concealed his property with intent to defraud his creditors, but the *facts* attending such disposition or concealment of the property must be set forth, and its relative value to that of the remainder of the property owned by the debtor, so that the circuit judge may know something about it as well as the affiant.

d—The fact that other creditors have levied upon a portion of the debtor's property, or that he has not sufficient property to pay his debts, will not warrant the issuance of the writ; and the allegation that the plaintiff will lose his debt if the writ is not issued before the debt becomes due is an inference or conclusion of fact for the circuit judge to draw, and not the plaintiff, from the other facts and circumstances set out in the affidavit. *Howell v. Circuit Judge*, 361.

13 Before the clerk is authorized to issue a writ of attachment under Act No. 149, Laws of 1889 (3 How. Stat. § 8016*a*), the statutory affidavit must be presented to him, with the order of allowance of the circuit judge indorsed thereon. *Howell v. Circuit Judge*, 369.

14. Act No. 165, Laws of 1887 (3 How. Stat. § 5067), prohibiting a change of text-books adopted by a school board under its provisions within five years, except by the consent of a majority of the qualified voters of the district present at an annual meeting, or a special meeting called for that purpose, applies to city schools organized under a special charter which does not provide for such annual meeting. *Jones v. Board of Education*, 371.

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STATUTES CONSTRUED—Continued.

15. The term "all other school officers," as used in Act No. 18, Laws of 1885 (3 How. Stat. § 5132), which provides "that in the election of trustees, and *all other school officers*, the person receiving a *majority* of all the votes shall be declared elected," includes the director, moderator, and assessor of primary school-districts. *Cleveland v. Amy*, 375.

16. The power to employ teachers conferred by How. Stat. § 5065, upon the district boards of primary schools, is coextensive with that conferred by How. Stat. § 5134, upon the boards of trustees of graded schools. *Id.*

17. Act No. 223, Laws of 1889 (3 How. Stat. § 1170 *n* 1), authorizing the issuance of injunctions at the suit of township treasurers to restrain waste upon lands on which taxes are due and remain unpaid, is construed as follows:

a—A bill may be filed under the statute upon a *refusal* of payment at any time after the taxes can be lawfully demanded, although the treasurer has not returned his tax roll.

b—In order to warrant the filing of a bill before the expiration of the time within which the taxes can be paid to the township treasurer, there must have been a positive, unequivocal refusal to pay the whole or some portion of the same. *Caldwell v. Ward*, 378.

18. How. Stat. § 8086, as amended by Act No. 266, Laws of 1889, authorizing the service of a writ of garnishment upon any officer or agent of a foreign corporation found within this State, is not confined to a *general* agent of the corporation.

So *held*, where service was made upon the resident agent of a mining company, whose duties consisted in acting as custodian of the corporate property in the county where its mining operations were carried on, and inspecting the work of its contractors in said county; which service is sustained. *Shafer Iron Co. v. Circuit Judge*, 464.

19. How. Stat. § 8061, requiring a garnishee to appear before a circuit judge or circuit court commissioner and submit to a personal examination touching his liability as garnishee, does not apply to a foreign corporation when summoned as garnishee. *Id.*

20. The fraud covered by How. Stat. § 6203, which voids conveyances or assignments of real and personal property, or

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STATUTES CONSTRUED—Continued.

any interest therein, if made with intent to hinder, delay, or defraud creditors, is not that practiced upon the assignee or grantee of the debtor, but upon creditors; and *actual* fraud need not be intended to render the conveyance void. *Cutcheon v. Buchanan*, 594.

21. How. Stat. § 6108, authorizing the filing of bills in aid of execution, includes equitable as well as legal interests in lands, and covers a partially paid up land contract assigned in fraud of creditors; said assignor having at least an equitable interest, with the right to obtain the absolute title upon full payment. *Id.*

SUPPORT OF PARENTS—See PARENT AND CHILD.

SURVEYS.

The Court adhere to the law laid down in the opinion reported in 73 Mich. 259, which governs the method of ascertaining and relocating lost section corners on township lines. *Hess v. Meyer*, 339.

TAXES.

1. Where, after the presentation to a city council of a claim for taxes paid under protest, four meetings of the council are held without any action being taken regarding the claim, a suit brought at the expiration thirty-six days from such presentation, and two days after the last council meeting, is not premature, under a charter provision barring such action if commenced before the council have had a reasonable time to investigate and pass upon the claim. *Whitney v. Port Huron*, 268.
2. If a citizen's property is threatened with seizure under a tax warrant, or his real estate is advertised for sale to satisfy delinquent taxes, he is, equally in both cases, entitled to free his property by the payment of the tax under protest, which payment will not be considered voluntary. *Id.*
3. The decision in *City of Detroit v. Martin*, 34 Mich. 170, that the payment under protest of a tax levied under an unconstitutional law, where the officer had no authority to compel such payment otherwise than by a sale of land, is a voluntary payment, does not apply to a case where the law under which the levy is made is constitutional, and the illegality of

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TAXES—Continued.

the tax is claimed because of irregularities or defects in the statutory proceedings. *Id.*

4. Where a tax-payer claims that the whole proceedings for the grading and paving of a street are void for want of jurisdiction, and on paying the taxes assessed against him on account of such improvement there is indorsed on the tax receipt a statement that the payment is made under protest, to protect the property from being sold, and on account of taxes being illegal, the protest is sufficiently specific. *Id.* 269.

5. A grain elevator erected upon its property by a union depot company organized under the union depot act of 1881 (How. Stat. chap. 93), and used as a grain warehouse in connection with its general business as a common carrier, is a necessary part of the equipment, and is not liable to taxation under the *general tax law* of the State. *Detroit Union Depot Co. v. City of Detroit*, 347.

6. Act No. 223, Laws of 1889 (3 How. Stat. § 1170 *n* 1), authorizing the issuance of injunctions at the suit of township treasurers to restrain waste upon lands on which taxes are due and remain unpaid, is construed as follows:

a—A bill may be filed under the statute upon a *refusal* of payment at any time after the taxes can be lawfully demanded, although the treasurer has not returned his tax roll.

b—In order to warrant the filing of a bill before the expiration of the time within which the taxes can be paid to the township treasurer, there must have been a positive, unequivocal refusal to pay the whole or some portion of the same. *Caldwell v. Ward*, 376.

See CONTRACT (6); DEED (1); MUNICIPAL CORPORATIONS (2-5).

TENANTS IN COMMON.

Equity will not permit one tenant in common, in the possession of property, for the use of which he is bound to account to his co-owner, to foreclose by separate advertisements three mortgages which he holds upon his co-tenant's interest, all of which are past due. *Dohm v. Haskin*, 145.

TEXT-BOOKS—See SCHOOLS AND SCHOOL-DISTRICTS (4-6).

TOWNSHIP BOARD.

1. How. Stat. § 745, which provides that when, from any

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TOWNSHIP BOARD—Continued.

cause, there shall not be three of the officers constituting the township board of a township competent or able to act, one of the remaining justices, on being notified by any member of the board, shall meet with any members of the board, and possess like authority with them, authorizes the members to call upon any justice of the peace of the township to act *temporarily* as a member of the township board. *Grondin v. Logan*, 247.

2. A township board cannot question the election or qualification of justices of the peace, who have acted and been recognized as such for more than one year, in *mandamus* proceedings prosecuted to compel the board to allow such justices to act as members thereof. *Id.*

TRUSTS AND TRUSTEES.

1. The owner of the minutes of pine lands agreed in writing to select therefrom and locate in the name of a second party 5,000 to 10,000 acres, the second party agreeing to furnish the necessary means, and to give to the first party an undivided one-fourth part of all lands so selected and located, which agreements were fully performed except the conveyance to the first party of his interest in the lands located. And it is held that the contract did not declare a trust; that upon its face it had simply the elements of an executory contract; and that it was the duty of the second party to make such conveyance, and until it was made the law would imply that he held the title to the interest agreed to be conveyed in trust for the party entitled to such conveyance. *Ripley v. Seligman*, 178.
2. Implied or resulting trusts may be established by proving the transaction out of which they result or are implied, and such proof may be by parol testimony. *Id.*
3. A grantee in a quitclaim deed may invoke the aid of How. Stat. § 5572, which declares that "no implied or resulting trust shall be alleged or established to defeat or prejudice the title of a purchaser for a valuable consideration, and without notice of such trust;" and he has the burden of showing the facts necessary to bring him within the statute. *Id.* 179.
4. A clause in a quitclaim deed of an *undivided interest* in lands, purporting to be executed in consideration of the sum

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TRUSTS AND TRUSTEES—Continued.

of one dollar and of love and affection, which declares that the conveyance is made upon the express condition that the grantee shall pay or cause to be paid, in due season, all taxes assessed upon the *whole* of a portion of the lands described in the deed, is held to be a condition subsequent, and not the valuable consideration referred to in How. Stat. § 5572, under which no implied or resulting trust can be alleged or established to defeat or prejudice the title of a purchaser for a valuable consideration. *Id.*

See LANDLORD AND TENANT (2).

ULTRA VIRES—See MUNICIPAL CORPORATIONS (7).

VENDOR AND VENDEE—See BONA FIDE PURCHASER; LAND CONTRACT; SALE.

WAIVER.

1. Where the vendee in a land contract assigns it to third parties as collateral security for the performance of a contract with them, and to secure them for money advanced to pay the balance due on the contract, with authority to the vendor to convey the land to the assignees, they will not waive their rights under the contract, assignment, and deed, which will be construed together and treated as a mortgage, by allowing the assignor to lumber the land with other lands owned by them. *Gamble v. Ross*, 315.
2. The conduct of plaintiff's agent in insisting that the harvesting machine purchased by the defendant should be kept over harvest for further trials, which resulted in the failure of the machine, is held to constitute a waiver of a provision in the warranty accompanying the machine that keeping it during harvest, whether kept in use or not, without giving notice to plaintiff of the defects complained of as provided in the warranty, should be conclusive evidence that the machine filled the warranty. *Snody v. Shier*, 304.

WARRANTY—See SALE (8).

WASTE—See TAXES (6).

WILL.

1. The burden of proof is upon the contestants of a will to

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WILL—Continued.

establish undue influence and incompetency to make it, and it is incumbent upon them to produce positive proof in support of either one or both of these propositions to entitle them to a verdict. *Prentis v. Bates*, 567.

2. Especially is it the duty of courts to exclude from the jury the unjustifiable statements of counsel, as well as immaterial and incompetent evidence, which might prejudice them, in a case involving the validity of a will, when the soundness of the testator's mind was not questioned during his life-time by any of his relatives, and he was left in the entire control and management of his large property until his death. *Id.* 568.

3. A will was contested on the grounds of undue influence and mental incompetency. After the case had been argued to the jury for six days, the court withdrew the former question from their consideration. On appeal by the proponents, they objected to the action of the court, on the ground that the ruling should have been made at the close of contestants' testimony, it being fair to presume that the jury were prejudiced by the arguments of contestants' counsel upon the question of undue influence. And it is held that it is important to eliminate such questions from the consideration of the jury as soon as possible, and that it is the better practice to have them discussed in the absence of the jury, if claimed to be questions of law and not of fact; but that it is quite possible, even where the question is first argued before the court alone, that the judge may not become convinced of his duty in the matter until after the arguments to the jury, and in such a case it will not be presumed that they did not follow the instructions of the court, and leave the question out of their consideration. *Id.*

4. Testimony that a testatrix talked more than some others; that she seemed erratic; that she talked upon various subjects; that she changed her mind as to the cost of a house which she was building; that she wanted different arrangements made from what the architect thought proper or consistent with good building; that she once got angry and screamed; that she scolded the men who were at work, changed her mind about colors, and became enraged and angry at those who were building her house,—is incompetent,

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WILL—Continued.

and does not tend to show her insanity or testamentary incapacity. *Id.*

5. Testimony that a sister of a testatrix became insane, and that her niece, at the age of 34, was sent to an asylum for treatment, is incompetent as tending to show her incompetency to make her will; no insanity being shown in any of her ancestors, and that of her sister being attributed by the physicians in charge of her case at the asylum to disease, and the characteristics of the malady in her sister and niece being in no respect similar to those claimed in her case. *Id.*
6. A superintendent of an insane asylum, whose knowledge of a former inmate is derived solely from her record appearing upon the books of the asylum from the time of her admission until her death, is not competent to give an opinion as to what must have been her condition during the period of her confinement, his proposed answer being based upon the absence from the record of those things which he says would undoubtedly have been noted if they had existed. *Id.*
7. Instances of forgetfulness alone are no evidence of incompetency in a testator to make a will, nor are they a sufficient basis for expert testimony on the question of his sanity. *Id.* 569.
8. A hypothetical question which, while mentioning some things which would possibly be evidence of some mental derangement, refers to facts which, standing alone or in connection with other things, have no tendency to show insanity or incompetency in a testator at any time, is incompetent. *Id.*
9. Contestants of a will will not be permitted to introduce contradictory evidence upon a given point, and then base hypothetical questions upon the theory that some of their witnesses are correct and others mistaken, or that some have testified truthfully and others falsely. *Id.*
10. It is eminently unfair, in a case involving the contest of a will on the ground of the mental incompetency of the testator to make it, to select a few facts which tend naturally to show competency and sanity, and ask an expert witness, who has testified that in his opinion the testator was insane, whether such facts change his opinion. *Id.*
11. It requires a less degree of capacity to make a will than a

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WILL—Continued.

contract, and when a testatrix is able to recognize her friends, relatives, and acquaintances, to make contracts, to know her property and tell what it is, and to take care of and manage it, the law says she is capable of disposing of it by will; and medical experts cannot set aside the law by stating that those facts make no difference with their opinions. *Id.*

See BONA FIDE PURCHASER (2); EVIDENCE (15).

WITNESSES.

Witnesses are entitled to respectful treatment, and it is the duty of courts to see that they are protected from the insinuations and attacks of counsel, whether direct or in the form of a suggestive question. *People v. Cahoon*, 456.

See EVIDENCE (4).

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